

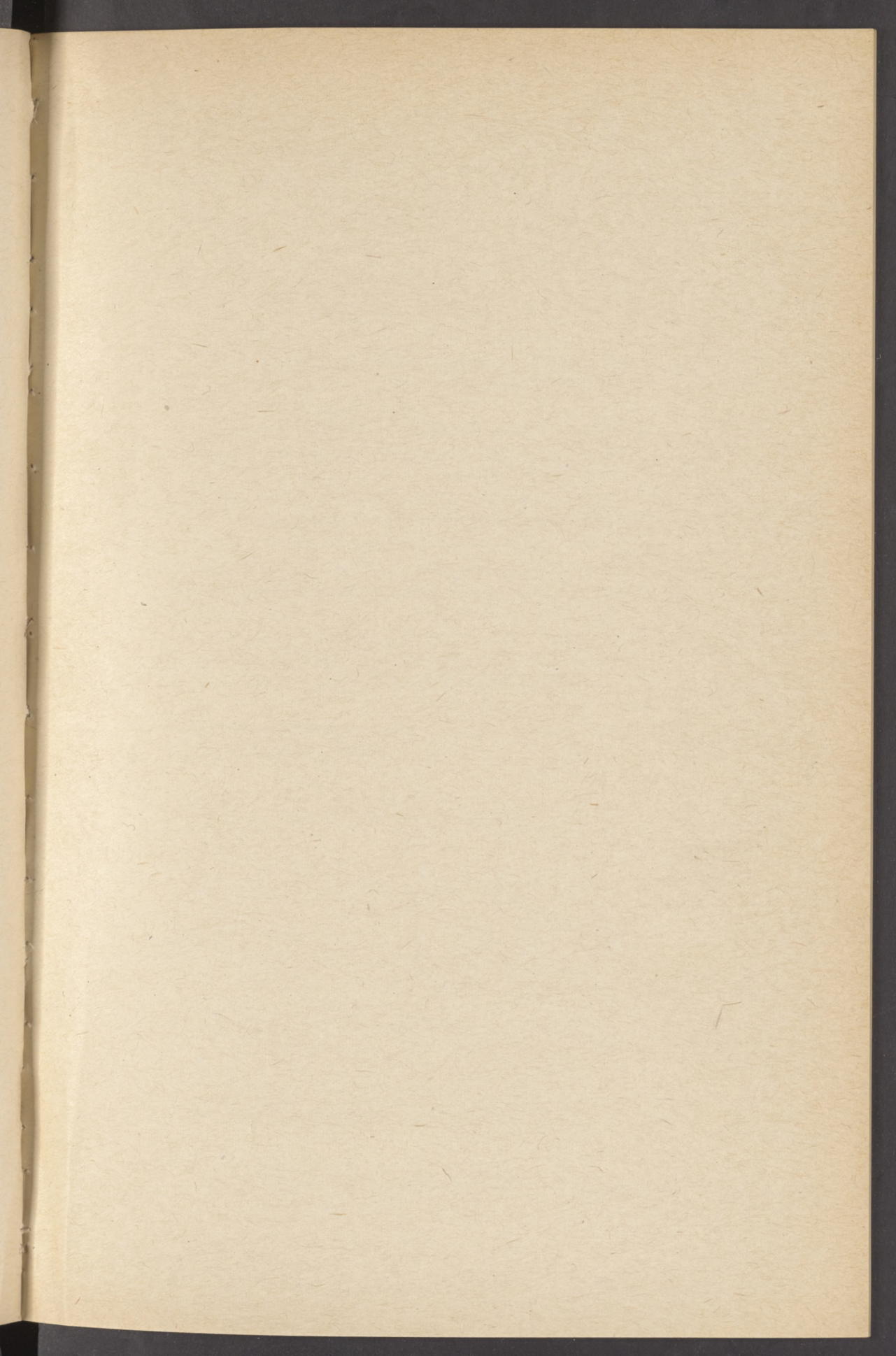
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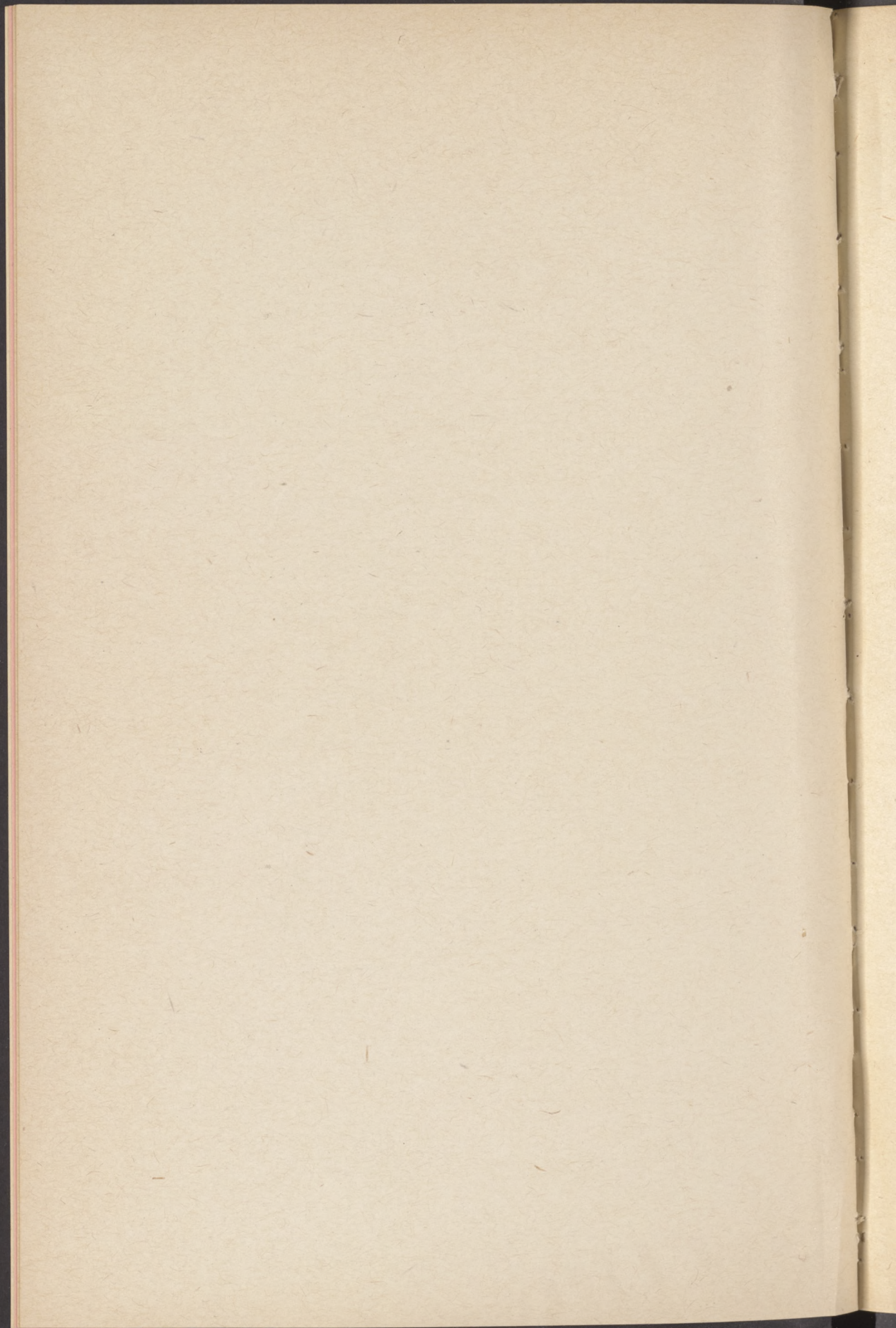
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SUMMONS.

(Filed July 31, 1930)

STATE OF NEW JERSEY to JERSEY COAST 10  
NEWS Co., a corporation of the State of New  
Jersey, defendant:

(Seal) You are summoned to answer the annexed  
complaint of Benjamin F. Butler, in an action  
at law in the New Jersey Supreme Court, and  
take notice that unless you file an answer to  
said complaint with the Clerk of the Supreme  
Court, at Trenton, within twenty days after  
service of this writ and the annexed complaint, the plain-  
tiff may proceed in the suit and judgment may be entered 20  
against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the  
New Jersey Supreme Court, at Trenton, this twenty-second  
day of July, A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD, Clerk.

ALBERT S. WOODRUFF  
WILLIAM HARRIS:, Attorneys.

## COMPLAINT

NEW JERSEY SUPREME COURT

CAPE MAY COUNTY

10

BENJAMIN F. BUTLER, <i>Plaintiff.</i>	}	Action at Law.
vs.		
JERSEY COAST NEWS CO., A corporation of the State of New Jersey, <i>Defendant.</i>	}	AMENDED COMPLAINT.

20

(Filed February 11, 1931)

Plaintiff, residing in the City of Wildwood, County of Cape May, and State of New Jersey, says that:—

1. On January 7th, 1930, an automobile truck of the defendant, then in use in its business and being operated by Thomas Perry its servant and agent in that regard, was in collision with an electric light pole along the public highway between Lakewood and Point Pleasant, New Jersey.

2. Defendant is, and at all times herein mentioned was, a corporation.

3. On said day the plaintiff was lawfully driving an automobile, owned by him, along said public highway between Lakewood and Point Pleasant when defendant's said automobile truck, operated by its servant and agent, overtook plaintiff's automobile and attempted to pass it at a very high rate of speed; (as the defendant's automobile truck was passing or attempting to pass the automobile of the plaintiff, or as defendant's said servant and agent was attempting to straighten out the course of said automobile truck, it slipped, skidded or became unmanageable and crashed into an electric light pole within the line of said public highway, breaking the pole and wrecking the automobile truck.) 10

4. At said time and place, the surface of said highway was glazed over with ice.

5. When defendant's said automobile truck came into collision with said electric light pole, the pole was broken and it partly fell, bringing down electric wires with it, which wires carried heavy charges of electricity; said wreckage of pole and wires fell and remained within the lines of said public highway and defendant's automobile truck, wrecked and overturned, was beside or entangled with said wrecked pole and wires and the remains thereof and it also was within the lines of said public highway; said automobile truck and the wreckage of the pole and wires, with some of the wires and parts of the wreckage highly charged with electricity, created an obstruction, a danger and a nuisance in said public highway, imperiling the plaintiff and other lawful users thereof. 20 30

6. When defendant's said automobile truck collided

with said electric light pole and was wrecked, defendant's said servant and agent, the operator thereof, was caught beneath the wreckage of the truck and lay endangered thereby within the lines of said public highway.

7. When defendant's said automobile truck passed or attempted to pass the automobile of the plaintiff, or as  
10 defendant's chauffeur attempted to straighten out its course, it slipped and slid along said highway and skidded into said electric light pole; as defendant's automobile truck was wrecked and defendant's chauffeur caught beneath the wreckage, plaintiff halted his automobile as quickly as possible and, believing that defendant's said chauffeur had been seriously or fatally injured and was in great danger, jumped from his machine and rushed to the wrecked automobile truck, overturned upon said public highway and to the assistance of defendant's servant; as  
20 plaintiff approached the wrecked automobile truck, the chauffeur was attempting to extricate himself from the wreck; plaintiff hurried to his assistance and so, without notice or warning of danger, came in contact with one of the wires which had been borne by the pole and brought down by the crash to hang suspended over a portion of said public highway, and plaintiff was shocked and burned. Thirteen thousand or more volts of electricity went thru plaintiff's head and body, from said highly charged wire,  
30 tiff's feet, and plaintiff was seriously and permanently injured.

8. Plaintiff's said injuries were sustained by reason of the carelessness and negligence of the defendant and of its said servant and agent, in that, at said time and place, he

he drove defendant's automobile truck at an unreasonably high and reckless rate of speed, the circumstances considered and so as to be beyond control; in that, notwithstanding the fact that said paved highway was then glazed with ice, which condition was visible and was known or should have been known to defendant's chauffeur, he drove defendant's automobile truck at an unreasonably and reckless high rate of speed around and beyond the automobile of the plaintiff, causing it to skid and become unmanageable and to crash into an electric light pole, breaking the pole and bringing down the wires heavily charged with electricity; in that the collision between defendant's automobile truck and said electric light pole was caused entirely by reason of the carelessness and negligence of defendant's servant and agent in driving said automobile truck at an unreasonable and recklessly high rate of speed, the condition of the highway and the circumstances considered and so causing and permitting it to get and be beyond his control; and in that, thru such carelessness and recklessness of defendant's servant and agent defendant's automobile truck was caused to be wrecked and its chauffeur caught in the wreckage, and the electric light pole to be broken, and the electric wires to fall to and near the wreckage where plaintiff came in contact with one of such wires, not having observed the same, and while acting upon an impulse to rescue defendant's servant and agent from what was apparently imminent peril of serious or fatal injury; and in that, thru said carelessness and recklessness of defendant's servant and agent defendant's automobile truck was caused to skid and become unmanageable and so to crash into said electric light pole then standing within the lines of said public highway and to wreck that pole, overturn defendant's automobile truck and bring down upon or in close prox-

imity to said public highway wires which had been borne by the pole and which carried heavy voltages of electricity and caused defendant's automobile truck to overturn and become entangled with said wrecked wires and to lay with the wreckage of said pole and wires upon and within the lines of said public highway, and to be an obstruction, a nuisance and a danger to plaintiff and other lawful users  
10 of said public highway.

9. As a result of coming in contact with said electric wire and the discharge of the electricity carried by such wire thru plaintiff's head and body, plaintiff was severely burned about the head and feet, and stunned and shocked, the flesh was torn from plaintiff's skull and his feet, plaintiff has been and will be caused to be treated and operated upon at hospitals and by physicians and surgeons and has been and will be required to expend moneys in and about  
20 attempting to be cured; he has suffered and will suffer great pain and has been and will be permanently weakened, lamed, crippled and scarred; plaintiff's hearing and sight have been impaired.

10. Plaintiff is now, and for a long time past has been a Ship Chandler at Ottens Harbor, Wildwood, Cape May County, New Jersey, and by reason of said injuries has been and will be prevented from giving his best time and attention and the full use of his faculties to the conduct of said business and, in consequence, has lost and will  
30 lose earnings and profits he would have otherwise had and enjoyed therefrom.

Plaintiff, Benjamin F. Butler, demands the sum of \$75,000. damages.

WILLIAM HARRIS,  
ALBERT S. WOODRUFF,  
*Attorneys for Plaintiff*

ANSWER.

NEW JERSEY SUPREME COURT

CAPE MAY COUNTY

BENJAMIN F. BUTLER, <i>Plaintiff.</i>	}	13
vs.		
JERSEY COAST NEWS Co., A corporation of the State of New Jersey <i>Defendant.</i>	}	Action At Law. AMENDED ANSWER

(Filed February 11, 1931)

Jersey Coast News Co., a corporation of the State of New Jersey, defendant in the above entitled suit, answering the amended complaint of the Plaintiff, Benjamin F. Butler, says that: 20

1. As to Paragraph One of the said amended Complaint, the defendant has no information sufficient to form a belief. Defendant has no information as to whether or not, at the time of the alleged collision with the electric light pole, defendant's truck was then being used in defendant's business, and leaves the plaintiff to his proof as to said allegations in Paragraph 1 of the amended Complaint. 30

2. Defendant admits it is a corporation.

3. Defendant denies all of Paragraph 3 of the amended Complaint, except that defendant admits its truck struck a pole carrying wires.

4. Defendant admits that there was ice on a part of the surface of a small portion of the highway.

5. Defendant admits that the pole struck by defendant's truck, partly fell, bringing down wires with it, and denies the remainder of Paragraph 5 of the amended Complaint.

10

6. Paragraph 6 of the amended Complaint is denied.

7. As to Paragraph 7 of the amended Complaint, defendant denies that its truck slipped, skidded, or slid as, or at a time when, defendant's chauffeur was passing, or attempting to pass, the plaintiff, or while defendant's chauffeur was straightening out course after such passing; defendant admits that its truck did collide with a pole carrying wires; defendant denies that its truck was wrecked, and denies that its chauffeur was caught beneath  
20 wreckage; defendant has no knowledge as to how quickly plaintiff halted his car, or as to what belief was then in plaintiff's mind; defendant denies that plaintiff rushed to the automobile truck, or to the assistance of the defendant's servant; defendant denies that as plaintiff approached truck that defendant's chauffeur was attempting to extricate himself; defendant denies that plaintiff then hurried to his assistance; defendant admits that plaintiff came into contact with a wire, and that plaintiff was there-  
30 by burned, but denies the remaining part of Paragraph 7.

8. As to Paragraph 8 of the amended Complaint, defendant admits its truck struck a pole, partly bringing down the pole, and some wires strung thereon; and denies each and every other allegation of said Paragraph.

9. Defendant denies Paragraph 9 of the Amended Complaint.

10. Defendant denies Paragraph 10 of the amended Complaint, and denies that it owes to the plaintiff any sum of money whatever, as damages, or otherwise.

SEPARATE DEFENSES

10

FIRST SEPARATE DEFENSE

The defendant was not guilty of negligence, itself, or by and through its alleged servant, who was at the time and place mentioned aforesaid, driving at a moderate rate of speed, and cautiously, under the circumstances, and the collision of the said defendant's alleged servant with the pole was the result of accidental circumstances, over which the defendants' alleged servant, driving lawfully and carefully as he was, had no control. 20

SECOND SEPARATE DEFENSE

The alleged servant of the defendant was not guilty of negligence in that, at the time and place aforesaid he could not reasonably foresee that harm would come to the plaintiff, even if defendant's servant failed to exercise due care, and defendant's servant, and defendant, were consequently not guilty of negligence. 30

THIRD SEPARATE DEFENSE

The negligence of the defendant's servant, if any, was not the proximate cause of the alleged injuries.

## FOURTH SEPARATE DEFENSE

The negligence of the plaintiff contributed to and/or caused the alleged injuries.

## FIFTH SEPARATE DEFENSE

10 At the time and place of the collision of defendant's car with pole, plaintiff saw, or ought to have seen, wires suspended from said pole, and apprehended, or ought to have apprehended danger therefrom; but despite this, plaintiff, without lawful excuse, voluntarily and unnecessarily placed himself in a position of danger, and voluntarily incurred the risk of danger, which was apparent, and was thereby injured, without any fault chargeable to the defendant, or its alleged servant.

20 SIXTH SEPARATE DEFENSE

The alleged injuries were not in truth suffered by plaintiff.

## RESERVATION OF MOTION.

30 The defendant herein specifically reserves the right in accordance with the Rules to move to strike out the entire amended Complaint in that it fails to disclose a legal cause of action, which right is so reserved for a time at, after, or before the trial of the within cause, pursuant to said Rules.

T. MILLET HAND,  
*Attorney of Defendant.*

REPLY.

NEW JERSEY SUPREME COURT  
CAPE MAY COUNTY

---

BENJAMIN F. BUTLER,  
*Plaintiff,*

vs.

JERSEY COAST NEWS Co.,  
A corporation of the State of  
New Jersey.  
*Defendant.*

Action at Law.  
REPLY TO AMENDED  
ANSWER.

10

---

(Filed February 14, 1931)

20

Plaintiff denies each and every allegation contained  
in the Amended Answer of the defendant.

ALBERT S. WOODRUFF,

*Attorney for Plaintiff.*

30

## TESTIMONY

## NEW JERSEY SUPREME COURT

## CAPE MAY COUNTY

10 BENJAMIN F. BUTLER,  
*Plaintiff.* }  
 vs. }  
 JERSEY COAST NEWS Co., } Action at Law.  
 A corporation of the State of }  
 New Jersey, }  
*Defendant.* }

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20 Cape May Court House, N. J., April 14, 1931.

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Before HONORABLE WILLIAM FRANK SOOY, Judge,  
 and a jury.

---

## APPEARANCES.

30 For Plaintiff: HONORABLE ALBERT S. WOODRUFF  
 and WILLIAM HARRIS, Esq.

For Defendant, T. MILLET HAND, Esq. and LAUR-  
 ENCE ELDREDGE, Esq. (of the Pennsylvania Bar.)

(The following motion was made in Chambers.)

Mr. Eldredge: There is a motion pending for judgment for the defendant on the pleadings, as I understand it.

The Court: That was the motion. You have said in your brief defendant was not guilty of actionable negligence to the plaintiff; the plaintiff voluntarily assumed the risk of the injury which he received, or he was guilty of contributory negligence; the defendant's conduct was not the legal cause of the plaintiff's injury. 10

Mr. Eldredge: They are my points, and the brief itself gives the argument.

The Court: I will overrule the motion to strike on the ground that the complaint states a cause of action, in my opinion. 20

(Exception noted for defendant.)

(The jury was sworn and Mr. Woodruff opened the case for the plaintiff to the jury; Mr. Eldredge opened the case for the defendant to the jury.)

BENJAMIN F. BUTLER, SWORN.

30

Direct Exmanition.

By MR. WOODRUFF:

Q. How old are you?

A. I am now 61.

Q. First I want to bring out what happened before the accident. What was your business?

A. My present business?

Q. Yes. What was it before the accident?

A. Grocery and ship chandler.

Q. And it is the same still

A. Yes.

10 Q. Where did you have that business?

A. Otten's Harbor in Wildwood.

Q. How long have you had a business there at Otten's Harbor?

A. I believe this my twelfth year. Eleven or twelve. I won't be positive.

Q. Had you run your business yourself all that time?

A. With one helper.

Q. What was the character of that business?

A. In what way do you mean?

20 Q. What kind of a business? What did you sell?

A. My business was about as funny a business as there is in the state of New Jersey. I sometimes have to start in at four o'clock in the morning and work until eleven o'clock at night.

Q. Why was it that your business often required you to get up at such an early hour?

A. Because the boats go out at four o'clock in the morning, and I had to get up and wait on them in the morning. If they were out late at night I had to be there

30 late at night.

Q. That is, the fishermen?

A. Yes.

Q. Was your store right at the wharf where the fishermen went out?

A. Right opposite the wharf.

Q. Then what other time would you have a rush hour?

A. Days when the boats were all in and none of them were out, it would be a blowy day, we would have a full day's work from morning until night, and when the boats were out and we worked on them night and morning, we could get a chance to rest in between by going home. I could make out without any more than one helper.

10

Q. Did you conduct that business right on up until this accident, just in that way?

A. Myself and son.

Q. Does your son live with you and work with you?

A. Yes, sir.

Q. On the day of the accident, where were you going?

A. Atlantic Highlands.

Q. What kind of a machine did you use?

A. Ford truck; ton truck.

20

Q. Mr. Miller, who accompanied you, how did you happen to get him?

A. I was going to bring back something in fishing tackle for him from Atlantic Highlands to Wildwood.

Q. Where did you pick him up?

A. I took him from my house to Atlantic City, to try to make it in one day, and started from Atlantic City in the morning at half past five.

Q. You stayed in Atlantic City all night?

A. Yes.

30

Q. And started from Atlantic City early in the morning to go to Atlantic Highlands?

A. So as to get up there and back in one day.

Q. Did this accident happen on your way to Atlantic Highlands or your way back?

A. On my way up.

Q. When you started out with your car in the morning in Atlantic City, what kind of a morning was it?

A. Well, as near as I can recollect, the evening was warm, but by morning it was very cold, and the dampness had — —

10 Mr. Eldredge: The best evidence of that is the record of the weather bureau.

The Court: He may testify as to what he himself saw, the conditions that he observed.

A. — — frozen on the cement roads.

Q. How did the cement roads appear and what was the effect in driving your car?

A. I took my car around the corner of North Carolina Avenue and Baltic and started down for Mr. Miller at the dock, and somewhere in the middle of the block, or a little by the middle of the block, there was a railroad car, and I pulled out around it, and when I pulled out around it there was a car coming around the corner and threw its lights in my eyes, and I shoved my wheel quick to get by this car, and the hind part of my car went as fast as the front for a bit.

20

Q. From that time on up until the time of the accident how did you find the pavements wherever they were  
30 hard surfaced pavements?

A. After I got Mr. Miller in and started and came back and turned the corner of North Carolina Avenue and went out the boulevard - - -

Q. I don't mean particular places where you saw it, but generally from then on up until the time of the accident how were the pavements?

A. Well, it was a slippery road most all the way. I drove very carefully, because I felt I had been warned twice to look out for an accident.

Q. This road where the accident happened was called what?

A. I believe it is called Laurelton and Point Pleasant Road.

Q. It is what kind of paving? 10

A. Cement.

Q. How wide is the cement, roughly?

A. I don't know. It is the regular cement road, the same as there is through the Court House here.

Q. Two paths divided by a middle line?

A. Right and left hand road of cement.

Q. As you came up just before this other machine appeared, what effect was there so far as ice was concerned on the pavement there?

A. Well, right where he passed me it was along a 20 piece of woods, and it seems as though the wind was a westerly wind and it had knocked the dampness onto the cement.

Q. Well, how was it?

A. Sir?

Q. How was it as you were driving over it?

A. It was glassy.

Q. How were you driving over that glassy surface?

A. Not over 20 or 25 mile an hour.

Q. Where were you keeping? 30

A. In the middle of the right side of the road.

Q. Did you know that this other car was back of you until it came up abreast of you?

A. Didn't know it until I saw him.

Q. Did you have any warning?

A. None whatever.

Q. No horn or anything of that kind?

A. No, sir.

Q. Were there any cars coming towards you at the time?

A. No, sir.

10 Q. Now tell us just what you saw of that car and what it was doing.

A. After he pulled out around me and undertook to come up in front of me again, he seemed to lose control of his car . . . It was all over the road like that. He couldn't steady it.

Q. You have told us your speed. How fast was that car going when it went around you?

A. I should judge he wasn't going less than 50 or 60 miles an hour.

20 Q. When did the skidding begin, when it began to do this zigzagging?

A. As he got by me and tried to pull back in front of me.

Q. How far did he take that course up ahead of you along the road before anything definite happened?

A. Well, to the best of my judgment, it would be something like five or six hundred yards.

Q. Then what happened?

A. He went off the road and into this electric pole.

30 Q. That electric light pole was on which side, your right or your left hand side?

A. Right hand side.

Q. How far is it away from the concrete, roughly?

A. I should say it was at least ten or fifteen feet.

Q. When the machine fetched up against that pole, what happened?

A. It came right out and turned right back into the road again, across the road.

Q. That is, the machine?

A. Across to the right hand side of the road. The machine.

Q. What happened to the man and the car?

A. Well, I stopped, fetched my car up.

Q. Before we came to your stop, the machine itself 10  
—did it stay on its wheels?

A. It turned over. Before he hit he pole he turned over, or as he hit the pole, and then shoots out across the road in front of me.

Q. What part of the highway, if any part of the highway, was it on when it actually came to a stop?

A. Him?

Q. No, the car; his car. . .

A. His car laid deliberately across the right hand 20  
side of the road going north.

Q. With the front of it pointing which way?

A. To the westward. The road run north and south, very near.

Q. That is, it was pointing across to the opposite side of the road?

A. Yes.

Q. With the back of it towards where the pole had been smashed?

A. Yes. 30

Q. Where was the man, the driver?

A. When I got out of my car, he apparently was under his own car, jammed, trying to get out.

Q. Go on and tell us what you did.

A. Mr. Miller had to get out of my car first, being that he set on the right hand side, and when he got out, he

slipped, and as I stepped down I looked to see if he had gotten up, and I went immediately on over to this man and started to help him out of his car.

Q. What did you do to help him out?

A. I stooped over and tried to pull him out. I don't know any more after that than I do now.

Q. That is the last you know?

10 A. Yes, sir.

Q. You didn't actually feel the shock itself, or at least, you have no recollection of it now?

A. Never knowed what hit me at all.

Q. What is your very last recollection? What were you doing at the last recollection?

A. The last I can ever remember is when I stooped over like this to take hold of him, and I didn't do it, or else when I straightened up I was knocked out. I don't know which. The wire caught me right here on this side  
20 of my head. I was facing towards the rear of the car.

Q. What part of the car was he under? The rear of the car?

A. No, sir, he was under where the driver would sit, or opposite where the driver would sit on a car. There was no getting out of the car any other way, because it was loaded with paper.

Q. When you stepped down, you spoke of Mr. Miller slipping and then you going ahead of him. What was the condition of the roadway there where Mr. Miller slipped, where you stepped down?  
30

A. I don't think I took time to notice.

Q. You hurried right over, did you?

A. Yes, sir.

Q. Before getting hit had you observed any wires at all?

A. No, sir.

Q. What were your mind and your eyes on?

A. As near as I can recall, my only aim was to get over there and give the man aid to get him out from under his car, for fear of his being mashed.

Q. Where you went and reached down to get hold of the man, where were you, on what part of the highway or off the highway?

10

A. I hadn't stepped off the cement yet.

Q. You were still on the cement?

A. Yes, sir. The car went off and shot back to the cement, across it.

Q. So when you were reaching to help him, you were still on the cement yourself?

A. Yes, but I fell off the cement.

Q. I guess somebody told you that, didn't they?

A. Yes. I learned afterwards at the hospital I took in a mouthful of gravel and carried it for seven days.

20

Q. Gravel in your mouth.

A. Yes.

Q. That is how you know it?

A. Yes.

Q. Where did you come to?

A. Point Pleasant Hospital.

Q. What was your condition as you remember it when you first came to?

A. I don't know what the first thing was. I think the first words I said, I spoke to Mr. Miller and asked him what happened.

30

Q. He was with you when you came to, was he?

A. Yes, sir.

Q. Where were you injured, as you found out when you came to?

A. Well, I only know what they told me at the time, I burned my head and my feet, the end of my fingers and all points like that all over.

Q. Was your head in bandages or had it been dressed at the time you came to?

A. Oh, yes, and so had my feet.

Q. Do you know how long after the happening of  
10 the accident you came to?

A. It was somewheres around half past four in the afternoon, as near as I can tell you.

Q. When you came to?

A. Yes, sir.

Q. What time had the accident happened?

A. Somewhere between seven and eight in the morning.

Q. Did you come to that same day?

A. Yes, sir.

Q. And it happened between seven and eight in the  
20 morning, you say?

A. Yes.

Q. You have spoken of your head. Where was it that the wound was? Is it where you have the bandage now?

A. Yes, sir, that was the heaviest.

Q. Won't you tell us other places where you had burns, taking your head first and your face, please?

A. Well, my glasses where they touched me, it burnt  
30 me across here and across my nose and back of my ears, wherever the metal touched me.

Q. When you raise your glasses there is a white mark on your cheek under your glasses and a white mark towards your ear.

A. Yes, sir.

Q. Are they the results of the burns?

A. Yes, sir.

Q. Were there other burns of your face or head?

A. Only these two places here.

Q. Two places on top of your head?

A. Yes.

Q. How about your hands?

A. Blackened the ends of my fingers, and it burned 10  
the bottom of this foot for two-thirds of the way up, clean  
back to the heel.

Q. That is your left foot?

A. It burned four holes in the heel where it went  
out of the nails. There is a place along here in the middle  
of my foot about four inches long in the beginning that  
was charred, and then it burned under the right toe here a  
place, and the flesh came out clean to the bone. It was  
kind of a circle under my big toe. That healed up first  
and allowed me to use that foot some three months before 20  
the other one.

Q. That is, you could use your right foot three  
months before the other foot?

A. Yes.

Q. How long, Mr. Butler, were you in the Point  
Pleasant Hospital?

A. I remained in there from the 7th of January un-  
til the 12th, I think, of February.

Q. And when you were let out of the hospital, what  
was your condition? Were you able to walk at all? 30

A. On crutches.

Q. What protection did your feet have?

A. Well, I had cotton on them, if you want to know.  
I had cotton all under this one.

Q. Were they bandaged?

- A. Bandaged and cotton underneath so I could step on them.
- Q. That was the one that you used?
- A. Yes.
- Q. The right one?
- A. Yes.
- Q. Could you put your left one on the ground at all
- 10 when you went out of the hospital?
- A. No, sir.
- Q. How about your head, what was the condition of the head when you left the hospital?
- A. Both places were solid sores at the time, that is, scabs.
- Q. And you went out of the hospital with that bandaged, of course?
- A. Yes.
- Q. Where were you taken and how were you taken
- 20 from the hospital?
- A. Why, the hospital people took me to meet a bus for Atlantic City, and then I took a bus from Atlantic City home.
- Q. Who took you home?
- A. The bus took me home.
- Q. Well, did somebody come and get you?
- A. No, sir. Left me off at the head of the harbor and I walked out on crutches and one foot. Nobody knew I was coming home.
- 30 Q. When you got home then who was your family doctor to take care of you?
- A. Dr. Mayhew and my sister-in-law. She ain't a doctor, but she helped me out. - - -
- Q. That is Mrs. Olson?
- A. - - - until the present time.

Q. She has dressed your wounds and taken care of you in that way, has she?

A. Yes, sir.

Q. And has Dr. Mayhew taken care of you ever since?

A. Most every week I go to Dr. Mayhew, or every other week.

Q. Is he still taking care of you?

10

A. Yes.

Q. How long was it before you could step on your right foot without cotton or bandages on it?

A. Somewhere in the middle of May.

Q. Then you said it was three months longer before you could use your other foot to step down on it?

A. That was the right foot. I commenced to use both feet in May.

Q. You began to use both in May?

A. Yes.

20

Q. Did you use them without crutches then or still with crutches or a cane?

A. About the middle of May I was able to lay away my crutches.

Q. Did you use a cane or not?

A. I hobbled along the best I could, because I couldn't very well hobble around with a cane, around the store. I first would sit on a chair and take orders.

Q. You first what?

A. Would get a chair back of the counter and take orders to help out when I first commenced to do anything.

30

Q. You would sit there in the store and do as much as you could?

A. Yes.

Q. When you began to do that in May, had your right foot healed up? Was the wound closed?

A. I really think it had, as good as it is now.

Q. Isn't it completely healed now?

A. Well, it is as sore as if it is a fresh cut today, when I step on it.

Q. And how long is that place?

10 A. I suppose it is around two inches long now.

Q. Is it of any width?

A. Possibly a half inch wide.

Q. Is that scar tissue, that is, tissue like follows an injury?

A. It seemed to make a raise on the bottom of my foot like a wart like.

Q. Over that whole length?

A. Yes, sir.

Q. What is it you feel when you use it?

20 A. Feels like pins are sticking in the bottom of my feet.

Q. Do you feel that all the time whenever you use that foot?

A. I haven't stepped from the day I was hurt until the present without this hurting me.

Q. Your other foot, your left foot, you said was more extensively hurt?

A. Yes, sir.—I am speaking of that one now.

Q. You are speaking of the left one now?

30 A. Yes.

Q. In May when you were able to get around to get in the store, was your right practically healed up?

A. The same as it is now.

Q. How about your left one at that time? Is that the one that had the scar on it?

A. Well, they put cotton under the bottom—under my stockings and put my shoes on and managed to get over and back without my crutches.

Q. Was that still open or not?

A. It wasn't exactly open, but it was healed over with a hard callus on it, like, and it is still that way at he present time. I have been to Dr. Mayhew and consulted him several times on it and he claims it is the nerves 10 that hurt me when I step.

Q. Do you have that kind of place on both feet or only one?

A. Both of them.

Q. How big is the one on your left foot?

A. That is the biggest one.

Q. Is that the one you were talking about before?

A. Yes, sir.

Q. How big is the one on your right foot?

A. It is only a small place, about like a quarter, 20 under my big toe. It is hard and it is like there is a hickory nut under there when I step. It seemed to heal up in kind of a hard bunch.

Q. You spoke about your heel on your left foot?

A. Yes, sir.

Q. You said you had how many burns there?

A. Four. There was four shots of current went up from the nail instead of going out, and burned four holes in my heel. Three of them is hollows and one is a raised place, the same as the other one. 30

Q. Three are sort of hollowed out?

A. Yes.

Q. And the other is a raised place?

A. Yes.

Q. What effect do you feel from them at the pres-

ent time when you try to walk on that foot?

A. They just feel when I step like something is sticking in the bottom of my feet every time I step.

Q. Have you had that ever since you have been able to get around on your feet?

A. Yes, sir. I called on Dr. Mayhew three or four times to see if he could do anything for me.

10 Q. Well, those wounds outside of your head, which is where the white marks are, they healed up soon, did they?

A. They healed up immediately, while I was in the hospital.

Q. They weren't as serious as the others?

A. No, sir.

Q. You spoke of two wounds on your head. Were there two distinct burns?

20 A. Yes. A place that was never burned between the two where my finger passes now.

Q. There is a piece of good flesh?

A. Yes.

Q. And then two places burned?

A. On each side of it. It went in here, went all around my body and came out on this side. It seemed as though it doubled up where it came out and burned worse.

Q. Do you know yourself how long those burns were originally when you first could see them or have them dressed?

30 A. No. Something like four to five inches long across my skull.

Q. Has either one of them completely healed over?

A. This one has completely healed over on this-side.

Q. That is the one nearest to your left ear?

A. Yes.

Q. The one lower down on your head?

A. Yes.

Q. The one that is higher up than that, that isn't completely healed up yet?

A. No. It burned the skull bone and can't heal.

Q. It what?

A. It has burned my skull bone and can't heal until it is removed.

19

Q. Has there ever been a time since you were burned there that that has been healed over?

A. No, sir.

Q. You spoke of your sister-in-law as having dressed your wounds. Has she done that ever since the accident, or, at least, ever since you came home from the hospital?

A. Yes.

Q. How often has she had to dress them?

A. About every third she would send me to Dr. Mayhew, for fear there would be something wrong, and then I would go to Dr. Mayhew. One day last week I called on Dr. Mayhew.

20

Q. In between she would dress them?

A. Yes.

Q. How often was the place on your head dressed?

A. About every third day by either Dr. Mayhew or my sister-in-law.

Q. How long did she have to dress your feet?

A. Up until about the first of May.

Q. Since she has been dressing your head has there been a time when you knew whether or not the bone was actually burned, yourself?

30

A. Yes. One piece came out.

Q. How big was that? Do you have it with you?

A. I have it in the courtroom.

Q. It is here?

A. Yes.

Q. Has your son got it?

A. Yes.

Q. How big was it?

A. I should judge it was two or two and a half inches long, a half to three-quarters wide.

10 Q. How did it come out?

A. Of its own accord.

Q. Did that come from the wound which is still open?

A. Yes, sir. Well, from part of it. You see, where that came out has healed up.

Q. But there is a part - - -

A. The remainder of it where it is burned, the skull bone on the same wound, hasn't healed up yet.

Q. I see here a brown hat. Whose hat is that?

20 A. Mine.

Q. What hat is that?

A. The hat I had on the day I was hurt. There is where the wire struck me, where that dent is, and it burned thirteen holes in it.

MR. WOODRUFF: He is indicating on the left side of the brown felt hat where the holes are above the band and between that and the crease.

The WITNESS: Yes, sir.

30

Q. How many did you say?

A. Thirteen holes.

Q. And inside here the silk lining apparently is all burned?

A. Yes, sir.

Q. Was that done in this happening.

A. Yes, sir.

Q. And that is the hat you had on at the time, is it?

A. Yes.

Q. I see in the package also a pair of glasses. Are these the glasses you had on at the time, Mr. Butler.

A. Yes, sir. I bought them the fourth day of February and I had them on that day, and I have never been able to use them since, after I left the hospital.

Q. Before we come to the question of your eyes, here 10  
on the left part of this glass where it goes over your ear, what is that?

A. That is from the current where it went around me.

Q. That black rough part there is where it was burned in this accident?

A. Yes, sir.

Q. Is this the piece of bone in this package?

A. Yes, sir.

Q. Is this the piece of bone that came out of the 20  
wound?

A. Yes, sir.

MR. WOODRUFF: I will offer these in evidence. (The hat was marked Exhibit P-1, the glasses Exhibit P-2 and an envelope containing a piece of bone Exhibit P-3.

Q. Mr. Butler, you started to talk about your eyes, and I will ask you about those. You say you bought these glasses --- 30

A. Those glasses were bought the last Saturday in 1928.

Q. And you had been wearing glasses before this accident, had you?

A. Yes.

Q. You say you were not able to wear them after you came out of the hospital?

A. I went to Philadelphia and got glasses and came home on Sunday and this happened on Tuesday, and I have never been able to use the glasses after I left the hospital.

Q. Why not? They are apparently all right to put on.

A. They wouldn't allow me to see afterwards. I had  
10 to go and get readjustments, new glasses.

Q. Had you been able to see with them all right up to the time the accident happened?

A. I couldn't see to read with them hardly in the hospital.

Q. Up to the time of the accident, after you got the new glasses, you were able to see with them and use them all right?

A. Oh, yes, until I got knocked off.

Q. When you say knocked off, you mean almost  
20 electrocuted? You are referring to this accident?

A. Yes, sir.

Q. When was it you found your eyes were bad?

A. In the hospital. I couldn't read.

Q. That is in Point Pleasant Hospital?

A. Yes.

Q. How many pairs of glasses have you had since?

A. Only this pair.

Q. In other words, the pair that you got as a substitute for the pair you couldn't use?

30 A. Yes.

Q. Where did you get them?

A. Philadelphia.

Q. Did you have an examination before you got them?

A. Had to have another one to get these by.

Q. Before you got these new glasses what did you notice yourself about any difference in your eyes, following the accident?

A. Well, if I would drive my car and dark came on, I almost had to stop my car, for I couldn't see where the other car would be, so I had to do something for fear I would lose my license. Oftentimes I would go off the road, for fear I would run into another car.

10

Q. That is after you got up and got around so you could drive.

A. Yes, sir.

Q. Then you got these glasses?

A. Yes, sir.

Q. What was the effect you felt in your eyes? Not what you did, but what did you feel that was different?

A. Well, whenever I would read with those glasses my eyes would start to water like I was crying and become bleary, so I couldn't see, and I found it necessary around the store, to try to help, to have glasses so I could see what I was writing or what I wanted to copy.

20

Q. Since you have had these glasses you have on today, they have corrected that vision again, have they?

A. Yes.

Q. Did you have trouble with your hearing before this accident?

A. Not very much, but I do now.

Q. What difference is there in that respect since the accident?

30

A. Well, I think I am about three times as hard of hearing as I was before I was struck by the current.

Q. Do you have this difficulty in everyday life of hearing that we are having here today?

A. Well, I know I can't hear near as well.

Q. And you have that all the time, or is it just at times?

A. It is steady. Some people want to know if I am deaf when I ask them the second or third time what they have spoken to me in the store.

10 Q. That happens from day to day in your store, does it?

A. Yes, sir.

Q. Generally speaking, Mr. Butler, before the accident what was your health?

A. I could lick a wagon load of wild cats if they came along.

Q. You were a tough customer then? You were pretty healthy?

A. Yes, sir.

20 Q. Had you had any serious illnesses before this accident, of any consequence?

A. No, sir.

Q. How have you been generally? You have spoken about the particular things, but how have you been generally since the accident, since you have been out and around?

30 Mr. Eldredge: I object to that. I do not see in the amended complaint any allegation upon which the present line of questioning can be based. I think everything that has gone in up to this date has been mentioned as the injuries in Paragraph Nine but I do not see any allegation upon which the present line can properly be put.

The Court: Yes. "He has suffered and will suffer great pain, and has been and will be permanently injured," and so forth.

Mr. Eldredge: I think he has gone into the "crippled and scarred", and I think a general clause like that would not be admissible.

The Court: What he is attempting now is to show what his present condition is, as compared with his former condition, and he says "he has suffered and will suffer great pain and has been and will be permanently weakened," and so forth. 10

Mr. Eldredge: I won't press the objection.

(The question was repeated.)

A. Well, it is like this. I can't do no heavy work. I came in yesterday from Philadelphia with a load of rope, and I had to hire a man to help me do the work. I can drive a car all right and do light work, but I had to go out and hire a man to help unload it, and I have done it ever since I was hit. 20

Q. What is it that prevents you from doing the work?

A. When I stoop over and pick up anything of any weight I turn black in the face. If anything is up high I can take the weight, but when I go to lift it and stoop over, I can't see anything.

Q. Do you feel as strong as you did before the accident? 30

A. No, sir. I have got about one-half the strength I used to have.

Q. Do you enjoy your everyday existence now as you did before?

A. Well, I don't exactly have sick days or anything

like that, but I don't feel extra good on an average. Some days I am just cross, I guess. I don't know what else.

Q. You guess you are cross, you say? Is that the way you are generally now?

A. I don't feel like I used to. I feel different than I did before this accident, considerable, because I haven't got the push or ambition or grit that I had before.

10 Q. And you speak of it as cross, but do you feel irritable and provoked?

A. I am easier for people to get me off my base than I was before.

Q. Since the accident?

A. Yes, sir.

Q. About these persons that you hired, Mr. Butler, how much time did you have to have them, and how many people? Tell us about that.

A. Well, I took on two extra people last year and  
20 kept one boy between school letting out in the spring until school went on in the fall, and then by that time business had dropped off a little more so I could manage, the three of us employed by me, or four. Four at that time.

Q. You had two extra people, then, last summer?

A. Most all the time.

Q. From some time in June up until some time in September?

A. Yes, sir.

30

Mr. Eldredge: I object to testimony as to persons he had to employ as bearing upon the damages in this case.

The Court: Where is the allegation that would cover this line of testimony.

Mr. Woodruff: I think it is covered by the phraseology in Paragraph Ten, because if he has to have somebody else to do his work, he is losing his profits that he otherwise would have had from his own work.

Mr. Eldredge: I take it that we were not sufficiently apprised by that Paragraph Ten of this line of testimony. I think there should have been a specific allegation bearing upon that point. The fact that the man was a ship chandler and was required to do certain work and was not able to devote as much time to it would normally lead to the conclusion that his present earning capacity had been diminished, but I do not think it is a fair inference that apprised us of the fact that other people had been employed or that a number of people were brought into this business. 10

The Court: Yes, I should think so. It would apprise you that he had been unable to attend to his business in the manner that he attended to it before, and it would seem to be a necessary consequence that with the business still being conducted he had to have someone do it for him. 20

While the allegation is general, it seems to me it is specific enough so that you could not say you were surprised by it at all. I will permit it.

(Exception noted for defendant.)

30

Q. Since that time, since last summer, Mr. Butler, have you had to employ any extra help to do what you had been doing yourself?

A. No, because at Thanksgiving my business dwin-

dles down and I really don't need anybody in until spring.

Q. So that your busy season when you need extra help is the summer time, is it?

A. It is from April until Thanksgiving. So many boats goes away and lays up then there is very little to do.

Q. What difference did it make in money, your not being able to do the work yourself, to the profits you would  
10 have had out of that business?

A. Well, one person I paid ten dollars a week and boarded him, and another one fifteen and another one five.

Q. And boarded all three?

A. No, one I didn't.

Q. Boarded two?

A. Yes.

Mr. Eldredge: I take it my objection goes to this  
20 whole line of testimony and I am protected on it?

The Court: Yes, I will so consider it.

Q. Mr. Butler, this coming spring are you able to do the work that you couldn't do last summer, when you employed those people?

A. No, and never will be.

The Court: That will be stricken out, the latter part.  
30

Q. You are not able to now?

A. No, sir.

Q. Dr. Mayhew is here and can tell us about his bill, but what other money losses have you had by reason of this accident?

A. Well, I have had the hospital bill all the time while I was in the hospital.

Q. How much was that?

A. The doctor and the nurses.

Q. How much was the hospital?

A. My son can tell you more about it than I can.

Q. Did he take care of the payment of those bills?

A. I had to give him power of attorney to do business for me from that day to this.

Q. And he took care of those things, did he?

A. Yes.

Cross Examination

By Mr. Eldredge:

Q. Mr. Butler, I believe you testified, did you not, that after you got these present glasses you have been able to see satisfactorily with those? You so testified on direct examination, didn't you? 20

A. How is that.

Q. You testified on direct examination that although you couldn't see with the glasses you had on at the time of the accident, you have been able to see satisfactorily after you got the glasses you are now wearing; is that correct?

A. Most assuredly.

Q. I believe you testified also on direct examination that you were able to hear very well before this accident, but you haven't been able to hear very well since the accident; is that right? 30

A. I can't hear altogether as good today as I could before.

Q. But you didn't have any trouble hearing that question, did you?

A. I heard it partly, and I come pretty near asking you it over again. If you want to be sassy, I can do the same. I could catch only part of it.

10 The Court: You will answer the questions and you will not argue with the attorney.

A. Well, I won't take a slur from him.

The Court: One more word from you and I will withdraw a juror and declare a mistrial. Proceed, Mr. Eldredge.

20 Q. Mr. Butler, you testified that when you were in the hospital you had a mouthful of gravel for seven days. Can you tell me just what you meant by that?

A. Why, if I get your question right, that I had what?

Q. I believe that on direct examination you said that you had a mouthful of gravel for seven days, and I was interested in just what you meant by that.

A. Why, my whole system was numb and it took seven days before they found it out in the hospital, and then the gravel was around in my cheeks, in there.

20 Q. I see. So that for at least seven days some gravel remained there in your mouth? Is that it?

A. Yes.

Q. You also testified on direct examination that this accident took place between seven and eight o'clock in the morning. Have you any idea whether it was nearer

seven o'clock or nearer eight o'clock? Would you say it was after half past seven?

A. We had no time, none of us.

Q. It was a clear morning, was it not?

A. I only know what I was told. Somewhere around between seven and eight o'clock.

Q. You were there driving your automobile.

A. Neither one of us had a timepiece with us. 10

Q. You misunderstand me. I asked you was it a clear morning that morning?

A. Was it what?

Q. Was it a clear morning? Was the weather clear?

A. Clean, did you say?

Q. Clear?

A. It was not.

Q. It was not clear?

A. It wasn't overcast, but when you come to a damp place there was a cold mist. 20

Q. It was daylight and you could see perfectly well, couldn't you?

A. Must be daylight at half past eight, I should think. I don't know why I couldn't see.

Q. Well now, Mr. Butler, you were driving your automobile down this road?

A. I could see, yes.

Q. You know whether it was light or dark.

A. I ought to be able to see in daylight, certainly.

Q. Was it daylight? 30

A. It must have been daylight at half past seven or eight.

The Court: The question is was it daylight?

A. Sure, at half past seven or eight.

Q. You were driving your automobile down this road?

A. We weren't using lights.

Q. Why couldn't you just tell me it was daylight?

A. Why didn't you ask me that question?

Q. I did ask it.

A. You asked me if it was daylight.

10 Q. You say that the defendant's truck came up from behind you and passed you on the left side of the road, and then you said on direct examination that it got some five or six hundred yards down the road ahead of you when it ran into this pole?

A. Never in the world. I am following him. He don't get no five or six hundred yards from me. He gets five or six hundred yards from where he passed me.

Q. So this accident took place between five and six hundred yards from the place where the defendant's truck passed you?

A. Yes, sir.

Q. Is that correct?

20 A. Yes.

Q. How far would you say you were in back of the defendant's truck when the skidding into the pole occurred?

A. Somewhere about half the distance from where he passed me to where he went off the road.

Q. Then you were about 250 or 300 yards back of the defendant's truck at the time it skidded off the right side of the road; is that correct?

A. Yes, sir.

30 Q. How long did it take you to get up to the point of the accident?

A. You will have to get somebody to answer that question for me.

Q. Estimate it. I don't expect you to tell me accurately.

..

A. I couldn't give you any more idea than anybody else. When my car got up there I stopped.

Q. You saw the skid and you were coming down the road in the same direction?

A. Most assuredly.

Q. You came to within how close of the scene of the accident?

A. I suppose I was 50 feet away from him when I 10  
stopped my car; something like that.

Q. And you got out with Mr. Miller and then you walked down the road toward where the truck was by the highway; is that right, sir?

A. I was pretty near opposite to him, only he was over here and I am over here.

Q. You said you stopped 50 feet up the road.

A. 50 feet away from him. Not up the road.

Q. How far up the road?

A. I go off on the side of the road, like, to get out 20  
of the way of the traffic. He has got the right hand side of the road blocked.

Q. Exactly where was the truck of the defendant located when you came up there?

A. Across the highway, the right hand side of the road, the side of the road in front of me.

Q. And the telegraph pole had been broken off; is that right?

A. Well, I believe it had. I don't remember.

Q. You saw this accident happen, didn't you? 30

A. I saw the accident happen, but, man, when everything is done as quick as that to you what are you going to do? Are you going to tell all about it?

The Court: Answer the questions and don't argue with the attorney.

A. I didn't realize, Your Honor, the pole was broke.

Q. I appreciate that it is hard to remember some things that happened fifteen or sixteen months ago, and I am just trying to get your best recollection of it, that is all. I want to find what the facts are in this case. Did you see the plaintiff when he skidded off the road into the pole?

10 A. How is that?

Q. I mean the defendant. Did you see the defendant's truck skid off the road into the pole?

A. Most assuredly, I did.

Q. You did see it?

A. Certainly. Wasn't it in front of me?

Q. You said a moment ago you didn't know whether the pole had been snapped off.

A. I didn't, because I don't stop to look to see what is the matter when I get up there.

20 Q. Just what did you see the defendant's truck do?

A. I seen him run into the pole and overturn, but I don't know anything more except what I am told.

Q. You saw the truck hit the pole and you saw the truck overturn?

A. Yes, sir.

Q. Was the truck on its side?

A. Yes, sir.

Q. Just how much of the truck was on the cement part of the highway?

30 A. You will have to ask somebody who knows more than me, for I didn't take time before I was knocked out to investigate that part.

Q. When you came up there you saw the truck there in front of you?

A. Yes, but would you if I was jammed under

there take time to investigate all about that? I don't know no more about that than you do, really.

The Court: Mr. Butler, don't you see that you are just taking up a lot of time and you are causing a lot of confusion by trying to argue with Mr. Eldredge? Listen to the questions, answer them directly and it will be a great deal better for everybody concerned. 10

Q. Mr. Butler, just where was Mr. Perry, the defendant's driver, located when you say you went to rescue him?

A. He was down underneath the truck.

Q. Just what part of the truck was he under?

A. As near as I can tell you, like as if he was crawling out from the driver's seat. I didn't stop to see what particular part.

Q. Did you see him crawling out? 20

A. I tried to help him out.

Q. Where were you standing when you tried to help him out?

A. Well, my feet was on the cement road. His car had pulled across the cement road after it hit the pole and turned out.

Q. Did you ever have any conversation with Mr. Perry, the driver? Did you say anything to him?

A. Who?

Q. This driver. His name is Perry. 30

A. I don't know what his name is, and as far as I know I have never spoken a word to him except when I asked him if he was hurt when I was trying to reach for him.

Q. What did he say?

A. I don't remember. I couldn't—his answer never got to me before I went off.

Q. As you came down the road you didn't see any wires sagging down along the side of the road?

A. I did not.

Q. You didn't see any wires at all? How do you explain the fact that you didn't see a heavy electric wire sagging right down by this truck?

A. I don't know as anybody else can explain it. I  
10 didn't see them, and I don't think Mr. Miller did.

Q. You don't recall making a statement to Mr. Perry and saying to him, "Boy, you are lucky; look at that wreck"? Do you remember ever saying that to him?

A. Never repeated but one word to him to the best of my knowledge.

Q. And you say that Mr. Perry was under the truck when you got up there?

A. Yes, sir.

Q. May I suggest to you that Mr. Perry was stand-  
20 ing in front of the truck and was looking at the wreckage of the truck when you got there?

A. Where can you find a man that can say that?

Q. You deny that that is the truth?

A. I certainly do. Nobody else there but me and  
Mr. Miller.

Q. Do you deny that you stood in front of this - - -

A. I certainly do. There was nobody else there but  
me and Mr. Miller.

Q. And nobody came up there - - -

30 A. Some of them came up there after I was knocked  
out.

Q. None of them came up there while you were con-  
scious? Nobody came up to the scene of that wreck, at  
least, while you retained consciousness?

A. Not that I know of.

Q. And the only people who were there at the time you say were yourself, your companion, Mr. Miller, and the driver of the truck?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

DR. JAMES D. SMITH, SWORN.

10

Direct Examination.

By Mr. Woodruff:

Q. Dr. Smith, you are a practicing physician in the city of Camden, and connected with Cooper Hospital?

A. I am.

Q. How long have you been in active practice? 20

A. Since June 1st, 1914.

Q. How long have you been connected with Cooper Hospital in Camden?

A. For 15 years.

Q. At my request, Doctor, some time back when Mr. Butler was in Camden did you make an examination of him for me?

A. I did.

Q. Do you have the date of that examination?

A. I have

30

Q. When was it?

A. On the 5th day of August, 1930, at three o'clock in the afternoon.

Q. And you have also seen him since that time?

A. Yes, today.

Q. Doctor, what was his condition when you examined him in August?

A. At that time he came to my office with his head bandaged. I found that he had had a severe electric shock, with a burning away of a large portion of his scalp and a portion of the skull, the bond covering the brain. He had an area of scar tissue and ulceration that was six inches long and that ranged from one and a half to three inches in width. The wound was discharging pus and was open for an area of about four inches in length and an inch and a half in width. He had healed scars across his nose, back of both ears and on his left temple. He had a healed wound on his left lower leg over the shin bone, that measured four inches in length and one inch in width. He had four scars on his left foot, principally in the region of the left heel. Three of those were indented, where he had been burned severely. The wounds had sloughed and granulation tissue had filled in. The other had had an excess of granulation tissue and had formed over with a cushion-like pad. The wound stood out a bit above the level of the surface. Under his right great toe was a scar where an electric burn had burned away a portion of the toe a distance of an inch and a half in length and about one-half inch in width. He had at that time a mental irritability. During the course of my examination he would take exception to remarks that I made and become quite antagonistic. I reminded him on several occasions that I was examining him for himself, and to get all of the facts of his case I must ask him questions, and he was very excitable and easily gotten off of his base, and I noticed the similarity of his condition today as when I examined him in the quietness of my office. He had a dizziness and vertigo. When he would bend, stoop to pick up my pencil, which I would

drop purposely on the floor to get him to bend over, he would wobble considerably before regaining his upright position. He had an impairment of his vision that required a re-glassing. He has a definite hardening of the drums of both ears, especially the left ear, with some disturbance of conductivity. He has a disturbance of the bowel. When he goes to urinate, he frequently loses control of the bowel at the same time, due to the shock of the cord affecting the centers of the muscles of dejection, of bowel activity. 10

Mr. Eldredge: I ask that be stricken out. I do not believe the allegations of Paragraph Nine can be considered to cover the weakened condition of the bowel.

The Court: I will permit it to stand.

(Exception noted for defendant.)

20

Q. Continue, Doctor.

A. He has a general impairment of his mentality, affecting his nervous system.

Mr. Eldredge: I must object to this. I think that the question of mental impairment is a question of such significance that it must be pleaded specifically.

The Court: I would think that it would be an utter surprise to anyone under this complaint. 30

Mr. Woodruff: That may be stricken out.

The Court: It is stricken and the jury instructed to pay no attention to the mental condition.

Q. As to his general nervous stability as relates to the shock he had.

A. He is unable to withstand any activities that require much mental effort. He is very - - -

Mr. Eldredge: I object to that question.

10 The Court: Doctor, we are not dealing with impairment of mentality, on the theory that there is not a sufficient allegation for it, so please refrain from touching on that subject.

A. Do I understand Your Honor to mean that I am not to state my findings in full, but am to limit my findings?

Mr. Eldredge: I think that is most prejudicial.

20

A. I beg pardon. I mean nothing whatever by asking.

The Court: The statement made by the Court to the witness may be read by the stenographer. (The Court's statement was repeated as follows: "Doctor, we are not dealing with impairment of mentality, on the theory that there is not a sufficient allegation for it, so please refrain from touching on that subject.")

30

Q. Doctor, with regard to his nervous stability or any effect there may be upon that, due to the shock, will you describe that, please?

A. I will try not to get beyond the realm. It is very difficult for me to do it, because - - -

Q. Try to cover it the best you can.

A. To answer your statement, the man is visibly nervous.

Q. How does that affect him in his everyday life and his enjoyment of life?

A. It makes him irritable, less likely to be approached on account of this irritable condition, his sore feet, the constant burning and pain that he has from the scar tissue that affects the sensory nerves of the feet, and the irritation of the top of the head from the scalp, the destruction of bone, and this constant suppuration that is going on in his wound, all of this has a tendency to make the man very miserable. 10

Q. He has spoken of a piece of bone that has come out. What is that condition, as it affects the bone of the skull?

A. That is the outer plate of the skull. The burn has destroyed the periosteum, or the nourishing substance that covers the skull, that part of it involved in the ulceration and in the burn. 20

Mr. Eldredge: I object to that. There is an averment as to flesh being burned on the plaintiff's skull, but I see nothing that justifies any such line of examination as this.

The Court: I will permit it.

(Exception noted for defendant.)

30

A. The periosteum is considered under the line of flesh, rather than bone. That is destroyed. That is the nourishing membrane on top of the bone that supplies the blood. This is destroyed for quite an area, and the bone

is rotting, and the outer plate has already been destroyed, and there is a very thin plate between the brain itself and the outer surface, with the infection still going on, and no limitation of destruction yet in view. It is an open ulcer.

Q. Doctor, after it gets through the outer plate, how far is it to the brain?

10 Mr. Eldredge: If Your Honor please, I think that this is a line of testimony which is tending to show some effect upon the brain, and there is not a word in the pleadings that justifies any such thing.

The Court: No, there is nothing in the pleading that would justify this defendant in anticipating that it had to meet a condition of loss of mentality by reason of the injuries sustained in this accident, that I can see. If it is your purpose to attempt to prove that, they say they are  
20 surprised, and it cannot be proved without an amendment.

Mr. Woodruff. I am not going into the mentality at all. I am tracing the direct effect on the brain itself, which he has described. I am not attempting to talk about the brain. I am talking about this wound, how far it has reached and how much more structure there is there to be used up.

30 The Court: With that understanding, I will permit it.

Mr. Eldredge: I don't see that there is any averment which refers to any injury to the skull itself. It is the flesh surrounding the skull.

The Court: It says that the flesh was burned from the plaintiff's skull and his feet. I will permit the testimony.

Mr. Eldredge: May I say just one word more? My theory is that in the line of examination which is now being conducted they are going into injuries to the man's skull itself. They are talking about injuries to the bones in the skull, and there is no such allegation in the complaint. 10

The Court: I will permit it.

(Exception noted for defendant.)

(The question was repeated.)

Q. What is there between where it is now and the brain itself? 20

A. A very thin bony plate about one-eighth of an inch in thickness.

Q. And you say, Doctor, that this sloughing away, this eating away has not ceased?

A. It has not, no.

Q. Are there any parts there now coming away?

A. Yes, there is another portion of bone that in a short while will be ready to slough off and be pulled out of the wound. 30

Q. Doctor, what are the probabilities in this case so far as the man's future is concerned, having respect to the wound in his head and these wounds in his feet, if they figure?

A. The man has a very bad future physically before

him. Because of the fact that he was severely burned electrically, this current went entirely through his body from the top of his head to his feet, it has affected not only the external parts of the body, but it has gone through his nervous system, it has gone through his - - -

Mr. Eldredge: I object to that and ask to have it  
10 stricken out.

The Court: I will permit it to stand.

(Exception noted for defendant.)

A. It has gone through the muscles, the blood vessels, and taken with it its toll of destructive energy that has tended to age him, to slow him up, to make him unable to do his work, for fully fifty percent of his total capacity.

20 Q. Now, Doctor, as to the present time, is there any natural expectation of improvement during the rest of his life?

A. I do not believe so. The man is 61 years old, and recovery would be very slow naturally from any injury, and extensive and severe injuries of this type would make it very, very slow indeed and very little would occur.

Q. What is the probability so far as the wound in the head is concerned? Is there any cure for that now?

A. There is not.

30 Q. Is there anything, Doctor, that can be done for it other than dress it as it is being dressed from day to day?

A. No, Nature has got to take care of it. There may be occasions to lift parts of destroyed tissue out that remains there, as unable to lift itself or to shed itself, and that must be cleaned from time to time, must be kept un-

der the supervision of an attending physician.

Q. And that is about all you can do?

A. All you can do, yes.

Cross Examination.

By Mr. Eldredge:

19

Q. Dr. Smith, you didn't see Mr. Butler until some seven months after the time he was injured, did you?

A. That is correct.

Q. And at that time, at the request of the senator, you then examined him to determine just what you considered the extent of his injuries to be; is that right?

A. Yes.

Q. When you made this examination—by the way, have you examined him at any other time than on August 5th, 1930?

20

A. Today.

Q. Today?

A. Yes.

Q. And there have been no intermediate examinations at any other time?

A. No.

Q. Then you have seen Mr. Butler on two occasions, on August 5th, 1930 and today, before your testifying here in the court?

A. Yes.

30

Q. This condition of the head and this bone which you speak about, a little piece of which came off, that frequently happens with any bone injury, does it not?

A. It does.

Q. And it is quite frequent that if a man has a frac-

tured leg, for example, there will be little slivers of bone that will splinter off; is that right?

A. Correct.

Q. That in itself isn't a very serious thing to have happen? That in itself isn't necessarily serious?

A. Yes, it is serious.

Q. I see. But it happens very frequently?

10

A. It does.

Q. Now then, why would you say that this continued condition there in the bone in the head goes on? Why isn't it checked?

A. I believe that the blood supply to the part has been cooked and destroyed, and that - - -

Q. Is it not probable that if a wound of that nature wasn't given the proper cleaning and dressing, so that some infection would be permitted to accumulate there, would that satisfactorily account for this bone condition?

20

A. Not entirely.

Q. It would to a considerable extent, would it not?

A. It would have something to do with it. It is necessary to keep it clean and properly attended to.

Q. And if it isn't kept clean and isn't dressed, naturally infection will go on there?

A. Yes, sir.

Q. And if it is kept properly cleaned and dressed by proper medical attention, then that infection can be to a very great extent, if not entirely, stopped, can it not?

30

A. It depends largely upon the blood supply to the part. In this case the blood supply is destroyed.

Q. When you say the blood supply is destroyed there is still blood circulating there, is there not?

A. Around the ulcer, the edges of it, yes.

Q. Would not the proper and usual treatment of this

injury to the head with this necrosis of the bone there wouldn't the proper and usual treatment have been to clean out that section and remove that injured bone and perform what we often see referred to in newspapers as a job of plastic surgery there?

A. Not always. Frequently we get in a lot of trouble by attempting that.

Q. But on the facts of this particular case, there wasn't anything to prevent that being done, was there? 10

A. Yes.

Q. What?

A. This was not like a fracture. In a fracture of the skull, surgical interference removes the fragments and the debris, and prepares the way for recovery by removing the obstructions. This condition was a cooking of the part, an electric burning of the part, a cooking, by which it was impossible to say how great the area of injury to the bone was. The external evidence of the area is not an indication of the extent of the burning. For instance, the devitalization of the entire scalp most probably took place, but the evidence that we had externally was just outside, just a comparatively small part of the scalp. It would have been very unwise to have gone in and to have extensively removed the cranium or the external part of the skull, as the man's life would have been in jeopardy. 20

Q. The cranium is the brain, isn't it? 30

A. It is the opening inside of the skull for the brain. To have gone into the wound and removed—

Q. I am not talking about that. I am asking about -- you had on top of that man's head some sort of a sore there

and some infection. That could have been cleaned out, couldn't it?

A. I don't think so.

Q. You think not?

A. I think not.

10 Q. There has been certain tissue which has grown on that man's head, and there has been certain regenerative growth there in that the wounds have healed; that is right, isn't it?

A. That is right, yes.

Q. Well then, that means that the entire top area of the head certainly hasn't been devitalized, or that regeneration couldn't have taken place at all; that is right, isn't it?

A. That is wrong.

20 Q. If the entire top of the skull was devitalized, then there could not be the growth of new tissue there, could there?

A. Oh, yes.

Q. What does vital mean? Doesn't it come from the word meaning life?

A. Yes, but devitalization doesn't mean destruction.

30 Q. No, but it means removing the life source, doesn't it?

A. It means lowering the life source. Devitalization doesn't mean destruction. It means removing the resistance. Your words are wrong.

Q. All right, I bow to your greater knowledge on a matter of this kind.

DR. SAMUEL MAYHEW, SWORN.

Direct Examination.

By Mr. Woodruff:

Q. Dr. Mayhew, you practice where?

A. Wildwood, New Jersey.

10

Q. Mr. Butler, the plaintiff in this case, has been a patient of yours since he came out of the hospital at Point Pleasant, hasn't he?

A. Since April a year.

Q. Since April a year?

A. Yes; one year.

Q. When he first came out of the hospital and you came to take care of him, won't you give us a picture of his condition, briefly?

A. He evidently had been burned, presumably by electric current. He had carbonization of five or six inches on top of the head, right side of the skull, across the maxillary bone here, within the nasal bone, back of the ears, had a severe burn of the upper third of the anterior tibia, which is probably five or six inches in length, carbonization of the bones of the left foot, the heel and under the right toe.

20

Q. That describes the visible injury?

A. Yes.

Q. What condition were those injuries in?

30

A. Carbonized.

Q. Take the wounds on the foot. Had they healed when you first saw them?

A. No, sir.

Q. They were still open, were they?

A. Still open.

Q. And they still needed dressings?

A. Yes, sir.

Q. The wound in the head, has that ever closed up to the present time?

A. Not entirely.

Q. Has there ever been any time, Doctor, that there has been any infection, any separate infection set up here, other than just the general processes?

10 A. Just general processes, just infections you get in a chronic wound.

Q. Is this wound in the head now a chronic situation?

A. Yes, sir.

Q. Won't you describe briefly for the jury the course of that wound, the history from the time you saw it, Doctor, as a year ago up to the present time?

A. It has gradually improved. Very severe burn, which is the extreme of burn, carbonization of the head, 20 also both feet and the heel and under the right toe, and tissue absolutely destroyed, the external plate of the skull, due to this burn here. Part of it has sloughed out and the chances are the other part will slough out later.

Q. Where the part sloughed out, then it healed over, did it?

A. Gradually granulated.

Q. But there is still an opening there?

A. Yes.

Q. How large?

30 A. About that size.

Q. A quarter or half dollar? Which?

A. Shaped like that. Say about - - -

Q. Oval?

A. Yes, oval. About an inch to an inch and a half long and about an inch wide.

Q. Is it in that opening where you expect the piece of bone still to come away?

A. Yes, sir.

Q. Doctor, during all this period of time has this wound on his head been dressed regularly and kept antiseptically clean?

A. As far as my knowledge, it has.

Q. You saw it how often? Every how often? 10

A. From once a day to two or three times a week.

As it gradually got better, less. The nurse takes care of it in the meantime.

Q. That is Mrs. Olson?

A. Yes, sir.

Q. The wounds on the feet, did she also dress those?

A. Yes, sir.

Q. --- until they didn't need to be dressed any further?

A. Yes, sir. 20

Q. Do you feel, Doctor, that there is any possible cure in this case?

A. I beg to ask you what you mean by cure.

Q. Well, I meant just that. Is there any possible expectation that this man can be entirely right again, entirely recovered from his injuries?

A. His wounds will heal, but he won't be physically right.

Q. Never?

A. No, sir. 30

Q. May I ask what your bill has been?

A. That I really don't know, because I know he has paid me cash at times, and other times he hasn't.

Q. Perhaps we can get at it this way; You don't have an actual record with you?

A. No, I don't.

Q. How much per visit?

A. When he comes to the office, a dollar and a half.

Q. And when you went to him?

A. Two dollars.

Q. Or didn't you go to him?

A. I haven't been to him, I don't think, but twice.

10 Q. And you have seen him on an average of how often in this year that has gone by?

A. Two to three times a week. Twice a week, at least, taking the entire year, would be an average.

Cross-Examination.

By Mr. Eldredge:

20 Q. Dr. Mayhew, you said, I believe, that the first time when you saw Mr. Butler was just about a year ago, and that was in April of 1930?

A. Early part of April, yes, sir.

Q. Did he come into your office to see you at that time?

A. I had no office at that time.

Q. What were the circumstances of the contact between you and Mr. Butler, as to professional relations, of course?

30 A. He called me as his physician. I had been ill for three years and hadn't been practicing, and I returned to Wildwood, and he heard I was in Wildwood and he sent for me.

Q. Did you at that time go to his home to look him over?

A. No, sir.

- Q. He came - - -  
A. He came to where I was stopping at that time.  
Q. Where was that?  
A. About two squares from his home.  
Q. And you then began to treat him and have continued treating him since?  
A. Yes, sir.  
Q. And you have seen him on an average of twice a 10  
week?  
A. Yes, sir.  
Q. You don't know, I suppose, when Mr. Butler left  
the Point Pleasant Hospital, do you?  
A. Only by the history of the case.

DR. H. WESLEY JACK, sworn for the defendant.

Direct-Examination.

20

By Mr. Eldredge:

- Q. Dr. Jack, what is your full name?  
A. Horace Wesley Jack.  
Q. Where do you practice medicine?  
A. Collingswood, New Jersey.  
Q. How long have you been practicing medicine?  
A. 11 years.  
Q. What institutions are you graduated from?  
A. Hahneman Medical College in Philadelphia. 30  
Q. When did you graduate from there?  
A. 1917.  
Q. Are you on the staffs of any hospitals?  
A. West Jersey Hospital in Camden.  
Q. How long have you been on the staff?  
A. 11 years.

Mr. Woodruff: Unless counsel wishes to put on the record his qualifications, I will admit them.

Q. Do you specialize in anything particularly, or do you do general medical work?

A. I specialize in surgery, and I do some general work.

10 Q. Have you made an examination of Mr. Butler, the plaintiff in this case?

A. I did.

Q. When did you make that examination?

A. March 24th, 1930.

Q. Will you tell us just what your examination disclosed? Just what did you find when you examined him?

A. I found Mr. Butler a patient sitting in a chair --

Q. By the way, where was this examination made?

20 A. At the office of Lawyer Harris, Attorney Harris, in Camden. I found this patient sitting in a chair, apparently unable to walk. He had crutches by the side of his chair. His head was in bandages, as well as both limbs. He was perfectly composed when I examined him. He answered my questions intelligently, he did not hesitate during his answers, he was not antagonistic at all to me, he was quite willing to be examined, and seemed perfectly free in his answers to my questions.

Q. Will you tell us whether or not his hearing appeared to be affected?

30 A. As I remember, I did have to repeat some questions to him. I did not make note that he had any great defect in hearing.

Q. Will you point out specifically to the Court and jury what specific injuries you found? You have given us some general statements.

A. He had a large open wound of the frontoparietal region on the left side. This wound at that time was about four inches in length and two and a half in width. There was another wound posterior to that, just in back of that, which was about three inches in length and about an inch in width. He had evidence of where there had been wounds and healed in back of his ear, curling around across the nose, following the line of where the frames of his glasses had been. There was evidence of a healed wound of his left temple and evidence of three healed wounds in the occipital region of his head. 10

Q. Which of those wounds had healed up and which was still not in a recovered condition?

A. The two wounds of this particular area of the head in the frontoparietal region, and in the left parietal region. Those were the two wounds that were open.

Q. Had the other wounds made a complete recovery or not? 20

A. They had.

Q. So the only wounds that remained at that time were these two head wounds?

A. I didn't get a chance to make mention of his legs and feet.

Q. I mean in the head?

A. Yes.

Q. In regard to those head wounds, do you feel that you are competent to give an opinion as to the probable future of those wounds? 30

A. When I examined those wounds, the one in front was covered by a hard leathery scab, under which I could feel fluid, pus, and as I pressed on it, pus did come out from underneath it. As the man told me, that the brain was visible beneath there. However I could feel bone on

pressing. He said the bone was gone and the brain was exposed, but I could feel that the bone was there, but there was an extensive infection in that wound at that time.

Q. What in your opinion was the cause of that infection?

A. I felt that one cause for it was the fact that it had not been dressed for some time. He told me that his  
10 physician who had attended him first had advised him to return to him and that he hadn't been back to see him. I examined him on the 24th of March. His injury occurred January 7th. He said that he had been in the hospital five weeks. There was a lapse of time, five weeks, from January 7th until March 24th.

Q. Did he tell you on March 24th how long it had been prior to that time when he had had a last treatment to that head wound?

A. No, he did not.

20 Q. Can you from your professional knowledge state approximately how long, from the condition you found, it must have been?

A. No, I could not. His dressing was not clean at all. He unwound them himself, and he had been taking care of it himself.

Q. How do you know that?

A. He told me so.

Q. Did he say how long he had been taking care of them himself?

30 A. No, sir.

Q. Now, the condition which you found in these head wounds at the time you made this examination, what do you think would be the proper treatment to remedy that condition?

A. Unquestionably this hard leathery area with pus

beneath it, that certainly should have been taken away and the pus removed by cleansing it. If the bone was necrotic, then - - -

Q. When you say necrotic, what does that mean?

A. Diseased. Rotting is another word. Every effort should be made to make that wound as clean and as sterile as possible, with the hope that in the future, when that wound should become cleanly, if any necrotic bone was there it could be curetted away and curetted away into good tissue. You can't expect new tissue to grow over necrotic, rotten tissue. 10

Q. Doctor, let me ask you this: At the time your examination was made, if this wound had been thoroughly cleaned out and sterilized, which I believe you mentioned, what is your professional opinion as to whether or not a complete healing of those wounds could be made? What is your professional opinion as to what the result would be if it was cleaned out and treated as you think was proper? 20

A. I believe a complete healing of those wounds could have been effected in a much shorter period of time, if that wound had been cleaned out thoroughly all the pus removed and then antisepticized with various antiseptic solutions over a period of time until the wound was sterile enough to allow a plastic operation of the flap of the scalp to be moved over. It would shorten this man's period of disability—it would have shortened this man's period of disability greatly. 30

Q. Do you think that this head wound, if properly treated, is a permanent injury or not?

A. This man will be permanently scarred. I see no

reason why he should have permanent injury to internal structures. I believe this wound can be healed.

Q. But he will have some scars, of course?

A. Absolutely.

Q. Do you think that he has—any of the other injuries which have been testified to here are or are not permanent injuries? For example, let us take the injuries  
10 to the feet. Would you say that the feet injuries are permanent or that a complete recovery will be, if it has not already been made?

A. I believe a complete recovery as far as his feet are concerned can be made.

Q. Were there any other injuries which you found during this examination on March 24th, 1930? I believe you have covered the head and the feet.

A. I didn't make mention of the open wound on his left tibia region, left shin. That was present. And the  
20 injury to both his right and left foot.

Q. In speaking of the head you referred to some—I think you used the word rotten bone tissue. Will you tell us whether or not the presence of some rotten bone tissue is found nearly always in any bone injury?

A. Rotting bone tissue is not found in every bone injury, no. You may have a fracture of the bone and there is no necrotic bone.

Q. Is that frequently found in bone injuries or not?

A. In compound fractures you may have necrotic  
30 bone occur, osteomyelitis develop.

Q. Is there anything else you noted at the time of your examination which you have not testified to or which I have not brought out?

A. This man made no complaints as far as his abdomen to me. He made no complaints as far as his bowels

were concerned to me, and I did ask him that, too. I noted evidence that his heart was not good, that his heart was irregular. The beat was a little faster—92. Faster than normal.

Q. You said you didn't notice any antagonistic attitude or any nervousness or dizziness or anything like that?

A. No, I did not.

10

Cross Examination:

By Mr. Woodruff:

Q. Doctor, the quickened action of the heart naturally goes as the result of a shock which produces irritability or nervous excitement, doesn't it?

A. It may come from the excitement of my examination.

Q. And from a weakened condition due to the shock? 20  
A weakening of the natural strength of that organ?

A. His heart should have regained normal rate after a period of five weeks, as far as injury from his electric burn was concerned. Any organic disease he had of his heart previous to that burn might still be manifested.

Q. Do you know how many volts went through him?

A. No, sir.

Q. Wouldn't that have something to do with the effect upon the heart?

A. It could weaken its tone, weaken its strength. 30

Q. I mean the force of the electricity, the power of the electricity which went through him, would have some difference in effect, would it not?

A. Yes, sir.

Q. You did inquire of Mr. Harris or someone there

the voltage that had gone through the man before you made your examination or at the time you made your examination, did you not?

A. Not that I recall.

Q. Haven't you a note there of the voltage?

A. I have not.

Q. You have not?

10 A. No, sir.

Q. On that day, March 24th, 1930, you saw the man in Mr. Harris' office in Camden?

A. Yes.

Q. And when you came, you were half an hour or so late, weren't you, and hurried?

A. I can't recall.

Q. Don't recollect that you were late and hurried?

A. I may have been.

20 Q. It was about half past four, almost five o'clock in the afternoon when you came to make the examination, wasn't it?

A. No, it wasn't.

Q. What time was it?

A. It was at noontime, around one o'clock, and Lawyer Harris had gone around to lunch.

Q. Have you any note of that?

A. This man was going over to get his eyes attended to in the afternoon.

Q. Have you any note of that, as to the time?

30 A. No, I do not have the note here as to the time.

Q. I may be mistaken. It may have been the noon hour that was coming on instead of five o'clock that was coming on, but there was coming some time when they wanted to get away from the office, wasn't there?

A. Lawyer Harris wished to get away.

Q. Have you ever seen him since that time?

A. Never seen him.

Q. And that is the only examination you have ever made of the man?

A. The only one I have been requested to make.

Q. The other side has never asked you to make any other examination?

A. No, sir.

10

Q. Well now, Doctor, you have said here today on the stand that this wound should be healed. How can you say that justly and accurately without having seen it since that day in April, 1930?

A. I said that I believed that it could be healed, yes.

Q. Can you say that with any accuracy without having seen it since March, 1930?

A. One must draw upon one's experience in wounds of this kind, and thus with an area of necrosis, admitting that the bone, the outer table of the bone is necrotic, and that after this length of time the inner table is still not necrotic and hasn't come away, one can certainly feel that this wound should be healed, and considering also that there has been sufficient regeneration, that there has been some regeneration all during that time, that the wound has been improving all the time.

20

Q. But you are presuming that from not having examined him, aren't you?

30

A. Listening to the testimony as it has been stated, yes.

Q. But you haven't asked for any other examination

and the other side hasn't asked you to make any other examination?

A. No, sir.

Q. So you have to rely on somebody else, I presume, don't you?

A. Rely upon my experience as far as wounds of that sort are concerned.

10 Q. What other case did you ever have of a man who suffered burns as extensive as these from electricity that recovered?

A. Well, I can recall one in the West Jersey Hospital. I would not say that his burns were as extensive as these.

Q. That is the only one you can recall that recovered?

A. I have had other men who have received electric burns and recovered.

20 Q. But not serious burns?

A. But not serious ones, such as this.

Q. Doctor, why do you presume today that the inner table is not now affected?

A. I didn't say that it wasn't affected. I said that the inner table is still present; that the inner table is still present.

Q. How thick is it?

A. In this man? I do not know now.

Q. Ordinarily how thick is the inner table?

30 A. The inner table is about one-eighth of an inch.

Q. And you saw the piece here, did you, of this bone?

A. No, sir.

Q. Why did you presume that the outer table still existed?

A. I didn't say the outer table still existed.

Q. You presumed it still existed when you said you could bring about a cure, didn't you?

A. No. It has been testified that the outer table is gone.

Q. That is a piece of the outer table, isn't it?

A. Yes, sir, and that is quite thin. Just the outer part of the outer table. You have the deploe to go through 10 and then the inner table.

Q. Doctor, this Exhibit P-3 that I show you, the outer table, if that is gone, then there is a rather spongy substance between that outer sheet and the inner sheet of bone, isn't there? A shock absorber, rather a spongy section?

A. Below that is the deploe or the spongy portion of the bone.

Q. Then comes the inner table that you have spoken about? 20

A. Right.

Q. Since March, 1930, you haven't had any opportunity to see how far down that has gone, have you?

A. No.

Q. There is only spongy substance with openings in it, between where this outer table came out and the inner table, isn't there?

A. There is only spongy substance between this and the inner table, yes.

Q. Did you ever have personal experience with an electric burn, the effects of which went through the outer table of the skull? 30

A. I do not—I doubt very much if the electric burn went through this man's skull.

Q. I said the effects there.

A. In all probability, the infection that was there—to eat away this necrotic bone was caused by his infection.

Q. Have you ever had experience in such a case as that following an electric burn?

A. No.

10 Q. But, Doctor, you would naturally expect infected areas, would you not, and treat expectantly a case where there had been a wound made in the scalp, whether by burn or otherwise, and the dirt of the street or the dirt of the hat or the dirt from the hair got into that open wound?

A. You would naturally expect?

Q. Infection.

A. Yes.

Q. And you would treat expectantly for infection?

A. Yes.

20 Q. When you felt this leathery covering that had come over the opening and you could feel the pus moving about underneath it, you knew that that was affecting either the outer table of the skull or some part of that bony substance, didn't you?

A. I could not say whether the infection had extended through the periosteum or not, but it was most likely extending through to the periosteum and it most likely would involve the bone.

30 Q. And the periosteum supplies the blood, doesn't it, the circulation, the life-giving qualities and properties there?

A. Yes.

Q. So if that is destroyed, then it reaches to the outer table, doesn't it?

A. Yes.

Q. And if a piece comes out like this and the infection continues, it goes into the spongy substance?

A. Yes.

Q. And then what next?

A. If it continues on, the inner table may become involved and necrotic, the same as the outer table, and slough out, quite true, but why should you let it go on? Why should you not take out all the necrotic bone, just the same as if you had a fractured skull?

Q. I will answer that by asking you this: Dr. 10  
Young of Gloucester, who had an X-ray burn of the head,  
known to all the doctors in Camden County—why did he  
die?

A. I don't know why he died.

Mr. Eldredge: I must object to that. I do not think  
that was a proper statement.

The Court: I will sustain the objection, although the  
answer, of course, was that he did not know.

Q. Well, Doctor, you were familiar with Dr. 20  
Young's case, were you not?

A. No, sir.

Q. Has there ever been a case in your own person-  
al experience or with which you have had contact in your  
hospital where there hasn't been a complete cure after in-  
fection has developed?

Mr. Eldredge: I object to that.

The Court: This is cross examination of the witness, 30  
and I will permit it.

A. There have been cases where infection of the  
bone takes place and the patient develops a meningitis and  
dies, of course. I have also - - -

Q. In your experience?

A. Yes. I have also had cases where there has been  
an infection of the scalp and extending and inward.

bone, and have operated those cases and removed that necrotic area of bone, and the child is well.

Q. Where you did that operation, were those cases where the scalp, perhaps the periosteum or the outer table or the spongy substance underneath had been cooked or burned by electricity or some other element?

A. No.

10 Q. They were fractures or wounds from trauma, were they not, from blows?

A. Absolutely. But you have the infection to deal with, and that is what you have to deal with in this wound, as far as the bone is concerned.

Q. Could you or any other person say how extensive the destruction was from the electric current which was strong enough to create these burns?

20 A. No, sir, I could not say how extensive the destruction was, but you can see the area of regeneration, and if you can find the regeneration you know you have good tissue, not dead tissue.

Q. Well, Doctor, would you still operate in this case?

A. You would allow me to examine the man first before rendering an opinion, wouldn't you?

Q. Then it would be necessary to make a present day examination before giving a definite opinion as to the advisability of operation, wouldn't it?

A. Yes.

30 Q. And would an X-ray be advisable to see how deep this has gone ---

A. Yes.

Q. Before you would advise an operation?

A. Yes, sir.

Q. Would you take into consideration his age of 61 before you operated?

A. Yes, but take into consideration that the man has an open wound, in which the infection may extend into his brain and he will develop a meningitis and die if something isn't done for him.

Q. Is that a probability?

A. Why, certainly.

19

WALTER H. McNAMARA, SWORN.

By Mr. Woodruff:

Direct Examination.

The Court: Mr. McNamara is an engineer and he made this survey, I suppose?

Mr. Woodruff: That is correct. And he was present when five photographs were taken, also, weren't you? 20

The Witness: Yes, sir.

Q. And you have marked the place where the photographs were taken on your map?

A. No. I gave the photographer the location from a specific point or base point.

Q. I show you five photographs, Mr. McNamara, and ask you if they accurately depict that road at the time you made your map?

A. Yes, sir.

30

Q. And that was done on October 22, 1930, was it? Look at your notes.

A. October 22, 1930.

Q. Now, Mr. MacNamara, this is drawn to scale, is it not?

A. Yes, sir.

Q. And the scale is given on here, so that tomorrow if we wanted any distances we could get them ourselves?

A. Correct.

Q. The line of electric light poles as shown in these photographs and that are shown on your map here, are they within the lines of that state highway?

10 A. I don't know.

Q. But you have given us the accurate measurements there?

A. As to the location of those poles in relation to the paved road itself, yes.

Q. And this map that I have here is the map that you made up from an actual survey of this place that was pointed out to you by Mr. Butler?

A. Yes, sir.

Q. Was Mr. Miller there, too?

20 A. The old man, yes, sir, he was there.

Cross Examination.

By Mr. Eldredge:

Q. You made this survey by going out and making field notes, and then you prepared this; is that it?

A. That plan was prepared from the survey we made on the ground, from the measurements that were  
30 made.

Q. And this represents an accurate presentation of this section of that particular highway?

A. That is it.

Q. And it represents accurately the position of the telegraph poles with reference to the highway itself?

A. Yes.

The trial was adjourned until 10 A.M. Wednesday, April 14, 1931.

Cape May Court House, N. J., April 14, 1931.

Trial of the cause resumed at 10 A.M.

Mr. Woodruff: Yesterday these photographs were identified. I offer them in evidence now. (Photographs were marked Exhibits P-4, P-5, P-6, P-7 and P-8.) 10

Mr. Woodruff. I offer the map. (The map was marked Exhibit P-9.)

JOSEPH A. MILLER, SWORN.

Direct Examination.

By Mr. Woodruff:

Q. Mr. Miller, where do you live?

A. Wildwood, New Jersey. 20

Q. You have known Mr. Butler how long?

A. Since about 1900 or 1901.

Q. Were you with him on the day of the accident in his automobile?

A. I was.

Q. About what time did you leave Atlantiy City that morning?

A. Well, as near as I can judge, somewhere around five o'clock, I should judge.

Q. And this accident happened at about what time? 30

A. About eight o'clock or maybe a little after.

Q. Just before the accident and along where the accident happened, this was a concrete highway, wasn't it, state highway?

A. It was.

Q. What was the condition of the roadway on that particular morning just before the accident happened?

A. Well, it was pretty icy and slippery. Very slippery.

Q. Was that general all along?

A. More or less so all the way; everywhere.

Q. Describe that to us, will you?

A. Why, as near as I can tell, the ice wasn't very thick, but underneath it appeared to be kind of thawing a little, and in fact where the accident happened the road has a little descent to the eastward, running to the east, and there was more or less oil drippings from the machines and a little water underneath the ice. If you stepped on to it you would mash down and slip.

Q. How far along had you had that icy condition on that highway?

A. It ran more or less ice all the way along. Some places probably a little more than others. Some places the road appeared to be almost cleared off.

20 Q. What sort of weather was it?

A. Well, it was one of these raw, chilly mornings. Take it where there was any water, such as a little stream like over the Mullica or Bass River or any of them, there was a fog, quite thick, where the streams were, and then you would run out of it into the clear.

Q. Before the accident happened had you known that there was a machine coming up back of Mr. Butler's machine?

A. No, sir, I did not.

30 Q. Was there any horn from that machine before it passed you?

A. Not that I was aware of. I didn't hear any.

Q. What was the first you saw or heard of the second machine?

A. The first I saw of the machine was when it came up on the left side of us and passed us.

Q. What part of the highway were you traveling in at that time?

A. Well, somewhere about the middle of it. Perhaps a little to the right of the center of the road. I will say about the middle of the road.

Q. About how fast were you traveling? 10

A. That I couldn't exactly tell, but we weren't going fast, because the machine had been slipping and swinging. The back end sometimes seemed to want to go ahead, and Butler was driving very carefully on that account.

Q. This machine that went by you, what was the speed of that machine?

A. I couldn't say as to the speed of it, but it went by us pretty fast. I should judge it was going perhaps two foot to our one.

Q. As it went by you, which side did he pass you on? 20

A. On the left side.

Q. Then just tell us what you saw.

Q. Well, when he went by us he was hauled in again more in the center of the road, or tried to, and the machine got to zigzagging backward and forward across. He was apparently trying to get it under control, but there was ice and everything slippery and it took him quite a 30 while before he could get straightened up.

Q. What happened?

A. Well, he got ahead of us, I should judge, 150 maybe 200 feet, and the machine turned to the eastward and went into the bank, struck the pole, turned out, struck

the pole and rolled over on its side, and the pole fell down partly on top of it.

Q. What did Mr. Butler do with his machine after that other machine had turned over on its side and was down in the road there, or at the side of the road?

A. We run up as fast as we could to him, got up there in probably 50 or 60 feet, stopped his machine and  
10 we got out.

Q. Did he go off of the road on the right hand side or on the left hand side as you were going?

A. I got out of the machine on the right hand side.

Q. The other machine that hit the pole, was that on the right hand side of the highway?

A. Right hand side of the highway, yes.

Q. Which side did Mr. Butler stop his car, the right hand side or the left?

A. It was about in the center of the road, as near as  
20 I can remember.

Q. Then what did you do?

A. Well, got out. I got out of the machine ahead of Butler. I had to, because I was on the right hand side and the steering gear was on the left, and I got out of the car on my right hand side, and as I stepped out, I stepped on this ice and slipped. Butler got out by me then—he is a little quicker on his feet than I am, and I kind of caught myself by putting my hand on the car, and by the time I got straightened out he was quite a little ways ahead of  
30 me, and then we both hurried as fast as we could down to where the wreck was.

Q. Where was the wreck? Where had it finished up?

A. Where?

Q. Yes. What part of the highway, the side, or just where was it?

A. Partially onto the concrete road. I don't just know whether the back wheels was on the concrete or not. The front wheels was, and the pole was down partly over it, not directly in line with the machine, but at a little angle.

Q. Where was the man that had been driving that machine?

A. He was apparently crawling out from under the wreck, or trying to. It looked to me as though he was trying to get out from under the cab. 10

Q. When you both hurried over there, who got there first?

A. Mr. Butler did.

Q. What did he do or attempt to do?

A. He got there and reached down, apparently to get hold of the man or to help him if he could.

Q. Then what happened to him?

A. Well, he straightened up and then bang, he got in contact with that wire, and that was the end of Mr. Butler. 20

Q. Up to that time, Mr. Miller, had you seen the wires until after Mr. Butler was hurt?

A. I did not. I didn't notice the wires until after Butler fell, and I looked at them, and I didn't realize what made him fall.

Q. Where did Mr. Butler fall?

A. Where he fell was partly on the concrete. Most of him was on the concrete, and I think his head and perhaps his shoulders was off on the gravel. 30

Q. Did the man then get out without your help or not?

A. Why, he did get out, but I don't know how. My attention was attracted to Mr. Butler after I seen him fall, and after Mr. Butler fell I happened to glance and

saw this wire leading from the poles on either side, and it came to me right away what was the matter with him.

Q. Excuse me, Mr. Miller. Was one pole, the one that had been smashed, was that down?

A. Well, it was down within—what would have been the upper end of the pole was down within three or four feet of the concrete road.

10 Q. And over the concrete road?

A. Over the concrete road.

Q. Were the wires still fast to the top of that pole where it was over the concrete road?

A. They were.

Q. How close did that bring them to the machine where it was overturned?

A. Why, it was partially lying on the machine, as I remember it. It laid pretty near lengthways of the machine. It had a little angle to it.

20 Q. Had the base of the pole, as you saw it after Mr. Mr. Butler had been hurt, been broken completely thru?

A. Oh, yes, it was broken clear off.

Q. The wires themselves hadn't given way, but were held down by the weight of the pole?

A. No, they hadn't broken. The wires were all right. They weren't broken. They were held up from going clear on down onto the concrete.

Q. When Mr. Butler went down, you said your attention was then on him?

30 A. Yes, sir.

Q. Was he conscious or not?

A. No, sir, he was not.

Q. Did you see his injuries at that time, or couldn't you?

A. No. I could see that he was injured, but I didn't know how bad or anything like that.

Q. At the time he was stricken down was there anybody else there but you three men?

A. I don't think there was, now at that time. Shortly afterwards there was. Machines kept coming and stopping there.

Q. How did you get Mr. Butler taken away? 10

A. Well, I went to Mr. Butler. He was down there and I was going to roll him over to help him up, see if I could.

Q. Excuse me, I don't care about that. Did you get him away in a private machine or an ambulance or what?

A. I think it was a private machine.

Q. Some of these people that came up?

A. Yes, sir, some young man came to me. I asked the people standing around there. Other machines kept coming. 20

Q. Up to the time that Mr. Butler was taken away had he regained consciousness at all?

A. No, sir.

Q. And you hadn't remarked his various injuries at that time?

A. Oh, no, I didn't know how bad he was hurt.

Q. When he was taken away, did you stay with his machine?

A. I did not. I went with him.

Q. And he was taken to the hospital, was he? 30

A. Yes, sir, at Point Pleasant.

Q. Did you stay there with him or go back?

A. I stayed there until about seven or eight o'clock in the evening.

Q. Who took care of the machine? Other people?

A. The state troopers.

Q. Now, Mr. Miller, the truck that figured in this accident, the one that was overturned, what was that loaded with, if anything?

A. Why, big rolls of unprinted paper. That is, part of them were unprinted, I know. Whether all of them were or not I couldn't say, but I know some of them  
10 was, because I could see the paper and there was no printing on it.

Q. Was there anybody in the machine except the driver, in that machine?

A. Not that I know of.

Q. The only person you saw there?

A. That is the only one I saw.

Q. Were you there when he went away or not?

A. No, sir. I think he got in a machine and went somewhere. I don't know where.

20 Q. Before you went to the hospital or after?

A. Before.

Q. When you were with Mr. Butler, how long was it before he came to consciousness, if he did come to consciousness while you were there?

A. Well now, I can't answer that accurately, but I should say anywheres from one to two hours, as near as I could tell. It was after he got into the hospital he kind of regained—became semi-conscious.

30 Q. Did you see his injuries then in the hospital when they took care of him.

A. Yes, sir.

Q. What did you see?

A. Well, I saw that he was burned from being in contact with the wire, and of course, a little blood onto him.

Q. But not so much blood where it was seared and burned?

A. No; just seared.

Q. Did you see his feet, too?

A. Oh, yes.

Q. You saw all the places that were burned?

A. Yes.

Q. Now, Mr. Miller, after he came out of the hospital and came back home, up to the present time have you seen him more or less frequently?

A. Oh, every day, nearly.

Q. Is he now the same man in appearance and in his actions that he was before this accident?

A. Do I have to answer that question? I would rather not.

Q. Why would you rather not? Because he is here?

A. Well, no, I don't think Mr. Butler is the same man that he was. In fact, I know he isn't. 20

Q. You mean you would rather not go into details with him here? Is that what you mean?

Mr. Eldredge: I object to that. I think the witness should testify as to what he means.

The Court: Yes, I think the witness can testify.

Q. What differences, Mr. Miller, have you noticed yourself in Mr. Butler?

A. Well, he seems to be more irritable than he used to be. Quickly gets out of patience with anything. He is not as steady a man in one sense of the word as he used to be. 30

Q. Not as steady, you say?

A. Yes.

Q. You were with the surveyor who went and sur-

veyed the road for me and the photographer who took the pictures for me, weren't you, Mr. Miller?

A. I was.

Q. To point out the place to them?

A. Yes, sir.

Q. Did you point out the place where the pole had been broken down?

10 A. I did.

Q. I show you Photograph P-8, which shows a pole with some people standing down at the bottom of it. What does that indicate?

A. That I think is the pole that was broken off.

Q. You mean that is the one that was broken off or the one that was put in place of it?

A. The one where the collision was.

Q. That is the one where the people are?

A. Yes. There is a little turn in the road. There  
20 is a little descent in this road here.

Mr. Eldredge: I think we had better note on the record what part of the road that is, so the record will be clear.

Mr. Woodruff: Suppose we make an X over the pole?

Mr. Eldredge: That is satisfactory.

30

Mr. Woodruff: We are making an X on Exhibit P-8 over the pole which the witness marks as the one located where the pole was broken.

Q. Looking at this picture, P-8, are you looking in the direction that both machines were going?

A. Yes, sir, that is looking to the eastward.

Q. The way you were both going?

A. Yes, sir.

Q. And the pole which was broken was on your right?

A. On the right side, yes, sir.

Q. When you went there and this photograph was taken, was the broken pole there or not? 10

A. No, sir, I think not. I think that had been taken away and another one put there in its place.

Q. The pole that was broken, was or was not that pole similar to these poles that we see in the Photograph P-8 and these other photographs.

A. About the same. Yes. The same kind of a pole, and about the same height.

Q. I show you P-5. Is that a close-up picture of the same pole we have marked with an X on P-8?

A. That is the pole that was put in in place of the one that the machine broke off. There is the old stub of the pole that stood there before. 20

Q. Mr. Miller, you pointed to a stub on P-5. That is the stub of the one that was broken off?

A. No, sir.

Q. It is the stub of a still older pole?

A. A still older one that had been broken some— well, maybe years previous, for all I know.

Q. The only pole that shows in P-5 is the one that you say has been put in in place of the one that was broken off? 30

A. Yes.

Q. And these other photographs just show the same scene looking in the same way, only at different points along the road, do they not?

A. Yes. This is almost the same.

Q. This is closer up, P-4, and the other two are farther away, but they show the same road?

A. Yes.

Q. Mr. Miller, after Mr. Butler was stricken down, did you have any talk then with the driver before Mr. Butler was taken away?

10 A. No, sir, I never spoke to the driver.

Q. Did Mr. Butler have any chance to talk to him?

A. I should think not.

Q. Well, did he?

A. No, I don't think he did. Not to my knowledge he didn't.

Q. Did he stand around and talk to him?

A. Stand around? No, indeed, he didn't have no time to stand around.

Q. How long did it take it all to happen?

20 A. Almost instantly.

Cross Examination.

By Mr. Eldredge:

Q. Mr. Miller, I believe you said that you have seen Mr. Butler practically every day since he came home from the hospital back in February of 1930, which is about 14 months ago. Is that right?

30 A. Well, I have seen him ever since he came from the hospital, more or less. There might have been a day or two at a time that I didn't see him.

Q. Don't you live in the same house with Mr. Butler?

A. No, sir, I do not.

Q. Have you not lived in the same house with him at some time?

A. No, sir.

Q. You have known him since 1900 or 1901, haven't you?

A. I have.

Q. And you are a good friend of his, aren't you?

A. Surely, we are on friendly terms, yes. 10

Q. You are on very friendly terms, aren't you?

A. Well, yes, you might say we were.

Q. You say this truck had big rolls of unprinted paper in it. How did you happen to notice that so well?

A. Well, I don't know. I saw some of it roll out. That is all. I happened to notice it.

Q. Did you see this truck of the defendant when it skidded over into the telephone or light wire pole? Were you looking ahead and did you notice that?

A. I did see it. 20

Q. You saw it actually happen?

A. Yes, sir.

Q. And you could see it perfectly well, couldn't you?

A. Oh, yes.

Q. And the truck at that time was a considerable distance ahead of you down the road?

A. Yes.

Q. It was a considerable distance down the road ahead of you? 30

A. Well, it might have been 150 or 200 feet.

Q. You say 150 to 200 feet? Yesterday Mr. Butler testified that it was at least 250 yards. Are you now saying that Mr. Butler is wrong in that statement?

Mr. Woodruff: That is objectionable in form.

The Court: Yes, that is objectionable.

Q. Would you say that Mr. Butler was mistaken in his recollection?

10 Mr. Woodruff: I object. He cannot ask one witness to pass on the testimony of another witness.

The Court: I sustain the objection.

Q. Are you sure in your own mind that instead of being 150 to 200 feet, it was not 150 to 200 yards?

A. Well, I don't think it was that distance. I might be wrong in my judgment as to the distance. Mr. Butler might have been wrong.

20 Q. But you can't say with any degree of definiteness it was not more than 150 or 200 feet?

A. Well, I couldn't say that it was over that. According to my judgment, I don't think it was over that.

Q. When this truck skidded into this pole, you say it broke this pole completely off and the pole came down and was suspended above the truck leaning down towards it? Just what part of the truck was the pole hanging over and just what part of the truck were the wires hanging over?

30 A. Why, the pole was more over the forward end of the truck than it was over the back.

Q. The forward part of the truck?

A. Yes.

Q. Was the pole inclined at a slant out towards the road?

A. Yes.

Q. And leaning down on the front part of the truck? Is that it?

A. That is it.

Q. Did you notice how many wires there were that were leaning down near the front of the truck?

A. Well, there couldn't have been but the one, because there is only one wire that holds that pole.

Q. There was just one wire on the pole?

A. One wire, electric light wire.

Q. Was that wire in contact with any part of the 10 truck itself?

A. I can't answer that question, because I don't know, but I don't think it was.

Q. You don't think it was, but I am not positive.

Q. It is hard to remember these things, I know, about a year and a half later. What was the exact position of the truck? Was it upright or on its side, or how was it?

A. Turned over on its side.

Q. Turned over on its side? 20

A. On its side, and I don't know but a little more than over on its side. The top of it was mashed in and it was canted up pretty well.

Q. How high from the ground, Mr. Miller, do you estimate that this one wire was that was pulled down by the broken pole?

A. At the pole's end, I should judge it was somewhere about three feet, maybe four; I don't know.

Q. Three or four feet from the ground.

A. Three or four feet from the concrete road. 30

Q. And that was out on the front of the truck, and was it between the truck and the concrete part of the highway, if you recall?

A. It was partially over the truck, about where the engine and cab would be.

Q. You saw the pole broken off at the time when the accident first took place, didn't you? You saw the truck skid into this pole and saw the pole break off and then you saw it pull down the wires?

A. Well, I didn't see the pole break, but I seen the pole fall and the machine turn over all about the same time.

10 Q. And then as you came on up closer to the scene of the accident and as you got out and walked towards the wrecked truck, you saw this pole bending down over the front part of the truck, didn't you?

A. Why sure, when I got to it.

Q. It was in perfectly plain sight as you came walking up?

A. Yes.

Q. Do you recall whether you said anything about the broken pole to Mr. Butler as the two of you walked  
20 down there?

A. We didn't have no time. Butler was probably 25 feet ahead of me at that time, and it was only just a couple of minutes, not more than that, from the time we got out of the truck before we were there.

Q. The wires themselves weren't—this one wire was not broken, but the broken pole pulled it down and the wire was still connected to the poles on either side of the broken pole, wasn't it?

A. It was.

30 Q. As you came along there you saw that that condition existed, didn't you?

A. I didn't notice that until after Mr. Butler fell.

Q. But you had seen the pole down from the very beginning?

A. I could see the pole was down, but aside from the wires - - -

Q. You saw that the pole was not all the way down on the ground, but was three or four feet from the ground, didn't you?

A. The top end of the pole would be about that distance.

Q. You saw that a wire was holding that pole up in the air three or four feet from the ground, didn't you? 10

A. At the time I noticed Mr. Butler fall.

Q. Before? As you came down there?

A. I did not.

Q. You did not?

A. No, sir.

Q. Well, did you think that that pole was just defying the laws of gravity and standing up in the air with nothing holding it?

A. I don't know nothing about what I thought, but I didn't see them wires until after Mr. Butler fell. 20

Q. But you did see that the top of the pole was three or four feet from the ground, and yet you thought it was suspended there with nothing to hold it up?

A. I didn't say what I thought. I am telling you I don't know.

Q. I am asking you if you didn't see any wire holding it up, how you accounted for the pole being held up?

A. I don't account for it at all, unless it may have been laying onto the engine, onto the machine. 30

Q. You say it wasn't touching the engine, I believe?

A. I don't know about that. I wouldn't say whether it did or not.

Q. Are you now testifying that you thought the top of the pole was resting on the engine?

A. Well, it may have been on the engine or on part of the wreckage of the cab. I didn't examine that.

Q. You don't recall that it was, do you?

A. Well, I couldn't say whether it was or was not. I don't know.

10 Q. And then we are to understand your testimony to be that as you came down the road you saw that the pole had been snapped off and you saw that it was inclined at an angle out over the highway, and you saw that the top of the pole was some three or four feet from the ground, and yet you say you did not see that it was held up by any wire?

A. I don't know what held it up, whether it was wires that held it up or whether it was resting on the machine.

20 Q. You don't know what held it up?

A. No, sir.

HOWARD BUTLER, SWORN.

Direct Examination.

By Mr. Woodruff:

30 Q. Mr. Butler, you are a son of the plaintiff in this case, are you not?

A. Yes, sir.

Q. Have you worked with him in the store?

A. Why, I can't say just exactly how many years. I know the last two years.

Q. The last two years?

A. Yes.

Q. And you were working in the store with him before this accident, were you?

A. For a short while. For about—well, from June to January.

Q. And since you have more or less taken charge of the store, have you not? 10

A. Yes, sir.

Q. What difference did your father's condition following the accident make in the operation of that store?

A. You mean as far as the - - -

Q. As getting the work done was concerned.

A. It didn't make such a terrible lot of difference as far as getting the work done, but then I had to do more myself.

Q. What did you do in the summer season when he couldn't do his work, last summer? 20

A. You mean what part I took?

Q. Well, what part did your father take last summer? What part could he do?

A. Well, he couldn't do anywhere near as much as he had formerly.

Q. What did he do?

A. Formerly he used to get up as early as three o'clock in the morning and others at four, you know, just according to the requirements, and last summer I don't believe there was any time that he got over before five o'clock in the morning. I had to get over earlier myself. 30

Q. What could he do when he got over there, and what did he do?

A. Well, formerly he would have from ten to fifteen orders put up, and of course at that time, that early

in the morning, the cooks and the men would carry the orders out.

Q. That is for the fishing boats?

A. Yes. The cooks and the men on the boats would carry the orders out, because it would be impossible for him to deliver that many orders.

Q. After the accident could he do that work?

10 A. No, not so well. No, he couldn't do it as well. That's the reason I had to get over there early in the morning after that.

Q. How did he work around the store last summer? What kind of work did he do mostly?

A. Well, he would like take orders.

Q. Receive the orders?

A. Received the orders.

Q. And the rest of you would fill them?

A. Fill them and deliver them.

20 Q. What extra help did you have that you hadn't had previously?

A. We had two and - -

Mr. Eldredge: I would like to object to that in the form in which the question is put; that is, unless it is shown specifically extra help was necessitated by Mr. Butler's incapacity, it is irrelevant.

(The question was withdrawn)

30 Q. What assistance did you have last summer to do the work that your father had previously done?

A. Well, I took that part myself. Of course, we had to have another one to keep the books in my place.

Q. You did your father's and then it took one to do yours?

A. Yes.

Q. Your father's busy season is in the summer, of course, with the fishermen, isn't it?

A. Yes.

Q. And in the winter season he is not so busy?

A. Not so busy, no.

Q. What differences can you tell the jury about that you have observed in your father as before the accident and since the accident, in his temperament, his activity and his enjoyment of life; those things? 10

A. Well, as to his capacity for work, he is far behind before the accident. He can't put the work out like he did before. It is impossible. He can't get around on his feet.

Q. How about his temperament and his disposition with you and other people?

A. Well, his temperament since the accident is bad. He is irritable and hard to get along with.

Q. He said that you took care of the hospital bill. 20  
Do you recollect what it is? It is a small matter, I suppose?

A. No, it isn't very big. I have four receipts in my pocket from the Point Pleasant Hospital.

Q. What do they total?

A. The four receipts total \$100. They start out the 14th of January until the 4th of February. That is four weeks of just the hospital bill, the room rent, and there was one bill of \$40. I don't know what the \$15 was for, but there was one week's hospital room rent and \$15 for 30  
some other charges, I don't know what they were, but I didn't get a receipt for that.

Q. Additional to that?

A. Then I have a \$12 cancelled check, I believe - - -

Q. Still in addition to that?

A. That is in addition, yes, and then there is a \$2 receipt besides that. There is five receipts - - -

Q. And they total \$154?

A. - - - and a \$12 check. That is \$154, and then an additional \$40 from the beginning, from the first week, from the 7th to the 14th.

10 Q. Now, Mr. Butler, I have here a photograph taken of your father which purports to be taken September 25th, 1930, and I want to ask you if that is a true picture of the appearance of his head as of last September.

Mr. Eldredge: If Your Honor please, I think that the photograph ought to be here to testify as to when that was taken and of whom it was taken.

Mr. Woodruff: The boy knows whether it is of his  
20 father.

A. I took him up there to get that picture taken. I took him to the photographer.

By the Court:

Q. Were you there when they were taken?

A. No, sir.

30 By Mr. Woodruff:

Q. But you took him to the photographer?

A. I took him up to within half a block of the photographer, to have the picture taken.

Q. And you have seen the picture?

A. I have seen it.

Q. And my question was whether that showed his

condition as of that day, that is, his head condition as it appeared that day?

A. Yes.

Mr. Woodruff: I offer it in evidence.

(The photograph was marked Exhibit P-10.)

10

Cross Examination.

By Mr. Eldredge:

Q. In order that I may be perfectly clear, Mr. Butler, the total amount of these hospital bills and expenses is \$154 altogether? Is that right? I was confused in my mind, and I think the jury was, as to what the total amount was.

A. There is \$100 and a \$2 one and a \$12 and then the \$40 from the 7th to the 14th of January. 20

Q. That is \$154 total. All right. I believe you testified on direct examination that last summer your father was on the job most mornings about five o'clock in the morning when he got to work?

A. Last summer. Well, not every morning, no.

Q. Mornings when it was necessary to be at work at that time?

A. Yes.

Q. And he was able to do the work which had formerly been done, with your assistance, although you as a very good son had to do more work than you otherwise would have done? 30

A. Yes, sir.

Q. And to help you out on some of the work you

had formerly done, you got a bookkeeper to do some work that you didn't have time to do?

A. Yes, sir.

Q. Did that bookkeeper do any work in addition to work which you had formerly done?

A. Helped to put up orders, yes.

Q. So that was some additional work that that book-  
10 keeper was doing, or the man who was doing the work for you?

A. Well, I had to do that part before, you know.

Q. But the bookkeeper, in addition to doing that work which you had formerly done yourself, also did some additional work?

A. Yes, the same as I did when I was keeping books.

By Mr. Woodruff:

20

Q. That is, you did additional work besides just keeping books?

A. Oh, yes.

Q. And he did, also?

A. Oh, yes.

IDA OLSON, sworn.

30

Direct Examination.

By Mr. Woodruff:

Mr. Eldredge: If Your Honor please, at this time I would like to move to strike out all of the testimony relative to the payment of extra employees. They testified

yesterday that there were three employees hired to whom wages were paid last summer, and in view of Mr. Butler's examination just now, I think that the wages of the book-keeper would certainly be the only wages that would be competent on the question of damages.

The Court: You are asking me to deal with a question of fact based on all of the testimony, and deal with it 10 by striking out. I cannot do that.

Mr. Eldredge: I am taking it on the uncontradicted evidence of the plaintiff's own witness.

The Court: I will refuse the motion.

(Exception noted for defendant.)

20

Q. Mrs. Olsen, where do you live?

A. Wildwood.

Q. Do you live near to Mr. Butler?

A. Within about five or six squares.

Q. And you are Mr. Butler's sister-in-law, aren't you?

A. Yes.

Q. Mrs. Olson, you are not a trained nurse, are you?

A. No.

Q. But have you done practical nursing?

30

A. I have done some, yes.

Q. And you have had some study and some training for that, haven't you?

A. Some

Q In this case did you take care of Mr. Butler

after he came out of the hospital, so far as dressing his wounds was concerned?

A. I used to dress his head, yes, sir, and I still do.

Q. You still do?

A. Yes.

Q. When Dr. Mayhew wasn't doing the dressings, did you dress his head and his feet, as well?

10 A. Yes, sir.

Q. How often did you do that?

A. Why, every other day when he first came home, and sometimes he came every day when his feet got very much annoying to him.

Q. For you to dress them?

A. Yes.

Q. You did it every other day?

A. Yes.

Q. And Dr. Mayhew did it how often?

20 A. Dr. Mayhew went there, I suppose, about three of four times, maybe two or three or four times a week, just whenever he felt that he needed medical attention.

Q. And in between you did the dressing?

A. Yes, sir.

Q. Did you keep those wounds as clean as possible and your dressings as clean as possible on the head?

A. I did.

Q. How soon did you begin that after he came out of the hospital?

30 A. As soon as he came home. I suppose a day or two, because I haven't kept no record of it.

Q. But just as soon as he got home, as nearly as you can recollect?

A. Yes.

Q. And you have continued, as far as his head is concerned, up to the present time, have you?

A. Yes, sir.

Q. How long was it before the feet or either foot healed up enough so that you didn't have to dress them?

A. Well, that I don't recollect. As I said, I did not keep a record of it.

Q. And you can't recollect it now? 10

A. No. I suppose it was in May or so when his feet got healed.

Q. Did one heal before the other or both about the same time?

A. No, one healed up first.

Q. Do you recollect which one?

A. No, I do not. I didn't keep no record of it.

Q. What dressing did you put on the feet?

A. Gauze.

Q. What dressings on the head? 20

A. The same thing.

Q. How often do you change the dressings on the head now?

A. He comes about every two or three days to change them.

Q. You don't have to change them quite as often as you did before?

A. No not as often, because the discharges are less.

Q. The discharge is less?

A. Yes. 30

Q. Dr. Mayhew does he still alternate with you, still dress the wound?

A. Well, he goes up to Dr. Mayhew, which I don't always know when he goes, you see. We don't live close.

Q. You don't go with him to Dr. Mayhew?

A. No I don't.

Q. You dress him where? At your home?

A. Yes, sir.

Q. This wound on his head gave out, or there came out of that wound a piece of bone which we have had here in court. When did that come out, Mrs. Olson?

10 A. Why, I do not just recollect, but probably two months ago, or it might be more. I do not recollect just the exact time when it came out.

Q. In dressing it since, have you observed whether or not there is any more bone loose?

A. There is more bone loose, yes, sir.

Q. How do you know that?

A. Because there is a raising in the suture which you can plainly see on one side, a raised up part in the suture, which is loose, but the other part seems to be still adherent.

20 Q. In other words, one end of this piece which is coming away still seems to be fastened?

A. Yes.

Q. And the other piece is loosened and has come up?

A. Yes.

Q. Is that at the same place where the other piece came out or still a different place?

A. No, this is a different place, further across the front.

30 Q. Is this wound on the head still discharging pus or serum?

A. Considerable, at times.

Q. That still continues, does it?

A. Yes.

Q. Have you noticed any differences in Mr. Butler,

in his temperament and disposition and the way he acts, and in his activity, since the accident?

A. Well, more or less nervous at times, and also—well, his hearing is partly defective, more so than before.

Cross Examination.

By Mr. Eldredge:

10

Q. Mr. Butler did have some defect in his hearing before the accident, didn't he, Mrs. Olson?

A. Probably some, which I am not aware of.

Q. Well, I only want you to tell me what you know personally.

A. Well, yes, personally. I never paid much attention to it. I really did not. As far as having much intercourse with one another, I did not know much about it, no.

Q. When Mr. Butler came to the house to have you place these dressings on, do you know how he got to your house? Did he walk down there to see you? 20

A. No. They used to bring him.

Q. What is the extent of the training you have had as a nurse? You are not a trained nurse?

A. No, I am not a trained nurse. I have had practical—slight practical experience and also a small time in a hospital.

Q. What has been that slight practical training?

A. Well, my training was more in electro—and hydrotherapy, and then also I was assisting for two years in the hospital. 30

Q. What hospital?

A. Well, it isn't in the east. It is in Missouri.

Q. What was the nature of the assisting which you did in that hospital?

A. I used to assist the doctor in his office.

Q. In his office?

A. In his office and also sometimes in the operation.

Q. What kind of operation?

A. Different kinds.

Q. What kind?

A. Well, surgical operations in appendicitis and different things. Whatever comes into a general hospital.

10 Q. Do mean to say that you were in the operating room in major operations, assisting in the operation?

A. I used to be in, yes, sir.

Q. What would you do?

A. Well, frequently the physicians used to ask me if I wanted to look on.

Q. You went in there to look on?

A. Yes.

Q. But you didn't assist? You looked on?

A. Yes.

20

PLAINTIFF RESTS

30

(The following motion was made in Chambers:)

MOTION FOR NONSUIT.

Mr. Eldredge: If Your Honor please, I move for a nonsuit, and the reasons upon which I base that motion are the same reasons which I have given in my motion to strike the complaint, which are that the defendant was not guilty of actionable negligence to the plaintiff; the plaintiff voluntarily assumed the risk of the injury which he received, or he was guilty of contributory negligence; the defendant's conduct was not the legal cause of the plaintiff's injury. 10

The Court: I do not feel that I should grant a nonsuit. It seems to me the questions are questions for the jury.

(Exception noted for defendant.)

20

30

## DEFENDANT'S TESTIMONY

THOMAS S. PERRY, SWORN.

Direct Examination.

By Mr. Eldredge:

10

Q. What is your full name?

A. Thomas S. Perry.

Q. Where do you live?

A. In Asbury Park.

Q. How old are you?

A. 27.

Q. Do you recall January 7th, 1930, the morning of that day?

A. Yes, sir.

20

Q. Will you tell me where you were in the morning of January 7th, 1930?

A. I was coming from Tom's River delivering newspapers. I was all through, on my way back to Asbury Park.

Q. What kind of a car were you driving?

A. I was driving a one-ton Dodge Victory.

Q. What was in that truck?

A. There were a few bundles of returns, returned newspapers that hadn't been sold.

20

Q. How much of the truck did they fill?

A. Why, they didn't fill even the bottom of the truck.

Q. Between the driver—was anybody with you?

A. No, I was alone.

Q. Between the driver's seat and the rest of the

truck was there any partition, or could you just reach back into the truck?

A. There was nothing but the two seats. No partition at all. There used to be a little curtain there, you know, but that was removed a long time ago. The truck was pretty old.

Q. Will you tell me just what happened? Do you recall passing the automobile in which Mr. Butler, the 10 plaintiff, was riding?

A. Yes, sir, I do.

Q. About what time of the morning was that?

A. It was about quarter of eight.

Q. At the time you passed him, how fast were you driving your truck?

A. When I passed Mr. Butler?

Q. Yes.

A. I wasn't going over 30 miles an hour.

Q. By the way, did this truck have any device on it 20 whereby the speed of the car could be limited?

A. Why, yes, it has—the truck was governed for 40 miles an hour. It couldn't go over 40.

Q. It couldn't go over 40?

A. It couldn't go over 40. It was governed.

Q. What was the condition of the highway at the time and at this place?

A. Why, the condition was pretty slippery right there, but I was riding all night and the roads were all right all night long. Just in that particular spot it was 30 pretty slippery.

Q. Did anything happen to your car at the time you attempted to pass the plaintiff's car?

A. Nothing happened at all until after I got by him.

Q. Did you or did you not give any warning signal?

A. No, I didn't give any warning.

Q. And you passed him on the left hand side and got by him?

A. Yes.

Q. Then what did you do or continue to do?

10 A. Why, I continued to ride, and suddenly after I passed him about 100 feet, 150 feet, the car started to slide. It hit that icy spot.

Q. You hit an icy spot?

A. That is what I hit.

Q. When you hit this icy spot and you started to slide, then what hapened?

A. I couldn't get the car under control. It seemed to be going faster when I hit the ice. Naturally when you skid, the car gains in speed, so I just hit the pole, that is all.

20 Q. When you hit the pole, was this on the right hand side of the road?

A. The pole was on the right hand side of the road.

Q. You just skidded off to the right side, the same side you were driving on?

A. Well, I skidded back and forth, you know, and I was trying to straighten it up and I couldn't bring the car up, and I skidded right into the pole.

30 Q. How far do you estimate you skidded before you hit the pole?

A. Almost three-quarters the length of this room. That is about 100 feet, isn't it?

Q. You would estimate about 100 feet you skidded?

A. Yes.

Q. When you skidded, what happened to your truck after you hit the pole?

A. I hit the pole and the truck just turned over on its side and it just rested there.

Q. Were you hurt?

A. No. I stood in the truck a minute and looked around, so I crawled out through the back and I walked around the side of the truck and I stood on the cement walk there, you know, on the asphalt road, and I stood there looking at the truck. 10

Q. Did you see any wire broken or any pole broken, and wire down?

A. I didn't notice the pole, but I noticed the wire.

Q. How did you happen to notice the wire?

A. As I was crawling out through the back of the truck I walked around the side and I had to get under the wire to get on the asphalt road.

Q. Just where was the wire with the reference to the truck? 20

A. The wire was draped from one pole to the other and it was resting on the tire between the mudguard and the bumper of my truck.

Q. That is, the truck was over on its side?

A. Yes.

Q. And of course the wheel was sticking up in the air like this?

A. Yes.

Q. And this wire was down resting on the tire? 30

A. It was draped. It was just resting there. The tire was smoking.

Q. Was that the front or back tire?

A. That was the front tire on the right side.

Q. You say you crawled out through the back, and why did you go out through the back?

A. Why, the door was up in the air, and the other door was on the ground, so there was an opening in the rear, so I just went through the opening.

10 Q. You just walked out through the back and got out?

A. Had to crawl over the side.

Q. Came around and got under this wire which you saw there and stood on the pavement looking at the truck?

A. Yes.

Q. Tell me what happened after that?

A. Why, as I was standing there right close to the wire, you see—I didn't pay any attention to the wire so much, because—

Q. How high was that wire from the ground?

20 A. Just a little over my head, maybe a few inches.

Q. It must have been under your head, because you said you ducked.

A. Yes, I did duck under the wire. It wasn't under my head, but I did duck. I didn't really know what it was.

Q. You didn't want to take any chances?

A. I didn't want to take any chances. I almost removed it off with my hand to try to pull it away, but I seen it was a little higher and I walked under it.

30 Q. Was it sputtering on this tire?

A. The tire was smoking very much.

Q. After you got around in front, tell me what happened next.

A. Mr. Butler was riding behind me, you see, and he stopped his car—his car was already stopped and he

was approaching the scene, so when he came there I was standing right in front of my truck.

Q. Was anybody else there at the time?

A. There was another truck that was right behind me that was approaching at the same time in behind him. Coming in the opposite direction than I was traveling.

Q. Another truck had come towards you?

A. Towards me, yes, on the right side. 10

Q. Had that come up before or after your truck turned over?

A. That came up afterwards.

Q. Afterwards?

A. Yes, sir.

Q. Where did that truck stop?

A. That truck stopped a little further up from the accident towards Mr. Butler.

Q. It passed you and went a little beyond you and then stopped? 20

Q. And that was up near where Mr. Butler's car had stopped also?

A. I think it was, because I wasn't paying so much attention to that.

Q. Now then, did anybody get out of that other truck?

A. Yes, there were two fellows—three fellows got out of the car.

Q. Three men got out of the car? 30

A. Yes.

Q. When did they come down to where your truck was?

A. I think they all got there almost the same time.

Q. When you say all, who do you mean?

A. Mr. Butler and also the other gentlemen.

Q. Mr. Miller, who was with Mr. Butler?

A. No. Mr. Miler, I didn't see him until later.

He was walking from his car that was parked down there a little further up the road.

Q. You say they all got there together. Mr. Butler got there and who else got there?

10 A. The other three fellows was on the other side of the wire already. They were looking at the wreck. The truck was almost a complete wreck.

Q. Had any of those three men said anything to you?

A. One of them asked me if he could do anything for me and I said, "No, that's a job for the tower, for the wrecker; you can't do anything for me."

Q. What happened next?

20 A. Mr. Butler came up to me almost the same moment and he told me that was some wreckage. He says, "Look at that truck," so he was standing there talking to me right close to the wire, so naturally he was curious, he wanted to get on the other side - - -

Q. Never mind what you think he thought. Just tell me what he did.

A. He just stood there talking to me and he turned to the right, and when he turned to the right, I guess his hat came into contact with the wire. It was just about the same height.

Q. Did you see him come in contact with the wire?

30 A. I was standing no more than a foot away from him.

Q. Did you see him strike the wire?

A. I didn't see him strike the wire. All I saw was the electricity going through him.

Q. That is at the moment he touched the wire you

didn't see it, but you turned around and saw it right afterwards; is that it?

A. All I heard was a big humming noise like a motor. That is what I heard.

Q. What happened after that?

A. He fell over on his chin. He stood there not very long receiving the electricity, and he fell over flat, stiff.

Q. Did he fall on the concrete or on the gravel? 10

A. Well, he was half on the concrete and half on the gravel. He just laid there. He went through a few convulsions.

Q. What did you do after that?

A. There was cars passing by there, so I hailed one that was right opposite where the wreck was, to ride me up to the corner about a mile away, where we used to serve newspapers and I knew there was a telephone there, so I went up there and I called up the state police, and I called up my boss. 20

Q. And you reported the fact of this accident?

A. I reported that a man was killed to the state police, told them the spot and everything.

Q. Then what did you do?

A. I walked back to the place and the state troopers and everybody was there before me.

Q. Was Mr. Butler there when you got back?

A. No, he wasn't there.

Q. He had been taken away?

A. He had been taken away. 30

Q. You don't know who took him?

A. No.

Q. Where did you go after that? You went back and saw the state troopers, and then where did you go?

A. The state troopers were questioning me, so the

state troopers were wondering where Mr. Butler was taken, and so was I. You see, I was pretty scared after that. So we was riding back and forth, and finally the state troopers found out he was taken to the Point Pleasant Hospital, so I went to the hospital to see Mr. Butler, and I saw him in there.

Q. What time was that?

10 A. I saw him there with one state trooper. That was an hour later.

Q. About what time of the morning would you say you got to the hospital?

A. About nine o'clock.

Q. Was Mr. Butler conscious at that time?

A. Yes, sir, he was conscious. I even touched his arm. I was glad to see him alive.

Cross Examination.

20

By Mr. Woodruff:

Q. And you saw that he was injured, didn't you?

A. Yes, sir, I saw that he was injured.

Q. Well, did you tell your employer or anybody to whom you made a statement in this case that Mr. Butler's alleged injuries were not in truth suffered by him, in other words, that he wasn't hurt?

30 Mr. Eldredge: I am not sure of the purpose of this, but if the purpose is to impeach the witness by an affidavit filed by the defendant and not by the witness, I would not think that it would be competent.

The Court: No, but I presume what he is offering it for is an attempt to affect his credibility, and whether he will be able to follow it up I do not know.

Mr. Eldredge: I am not quite familiar with your rules of pleading in this state, but I know that as I read those pleadings I take it they are formal denials.

The Court: I assume what the senator is trying to do is to affect credibility. For that purpose only it is admissible.

10

(The question was repeated.)

A. Why, my boss was to the hospital with me at the same time, you see, my boss, the state troopers and myself, and only one state trooper and myself were allowed in Mr. Butler's room, so when I came out I just told the boss that Mr. Butler was alive and that his head was all in bandages and his feet was in bandages and I saw blood on his bandages.

Q. But you didn't report to them that he didn't 20  
have those hurts, did you?

A. Report to who?

Q. To your boss?

A. Sure, I told him he had them.

Q. Then he did have them?

A. Sure, I told him he was very badly hurt.

Q. Did you go back to see Mr. Butler after that  
while he was in the hospital?

A. I couldn't. I work every night.

Q. All night, practically? 30

A. Every night I worked all night.

Q. Had you been working all night the night of this  
accident?

A. Yes, sir.

Q. What are your hours?

- A. Ten to six; ten to seven; ten to eight; any time you get through.
- Q. Ten at night?
- A. Yes.
- Q. And you quit at seven or eight, when you are through?
- A. Sometimes I don't get through until twelve
- 10 o'clock. According to what time you get through.
- Q. Ordinarily you get through somewhere around seven or eight?
- A. Seven or eight every morning.
- Q. Where do you go to turn in your truck and quit?
- A. Asbury Park.
- Q. Were you on your way back with your return bundles?
- A. Well, you see every Sunday we pick up returns, and I think that was on a Monday morning. They leave
- 20 their returns out on Sunday night or Monday night or Tuesday night.
- Q. I say were you on your way back to Asbury Park to turn in your truck and your return bundles?
- A. Yes, I had some return bundles.
- Q. Did you have some calls to make?
- A. No more calls.
- Q. When you got to Asbury Park would you have turned in your truck and you would have been done for the day?
- 30 A. Yes.
- Q. That happened approximately at seven forty-five?
- A. Yes.
- Q. Were you a little late that morning?

A. No, I was taking my time. I was off the next day.

Q. The next day was your holiday off, was it?

A. Yes.

Q. Was that ordinarily the time you would pass that point in the road?

A. Sure, I always passed that point about the same time.

10

Q. So that it was practically your regular - - -

A. Yes, regular delivery.

Q. Regular route and regular time?

A. Yes, sir.

Q. Why didn't you blow your horn when you came up in back of Butler's machine?

A. Why, he was going very slow and there was a lot of room to pass, and I drive all night and it don't make no difference whether you blow your horn or not, it seems to me. I just passed him.

20

Q. He was going along what? 25 miles an hour?

A. No, I think he was only going about 15 miles an hour.

Q. Didn't it strike you that he was being very, very careful riding along that road, if he was only going 15 miles an hour?

A. Why, I wouldn't say he was careful. I was thinking that was all the car could go, maybe. I wouldn't be surprised.

Q. For that reason, that in part, you didn't blow any horn but went around him and attempted to straighten out again in the road, of course?

30

A. Why, no. When I passed him I was straightened all right. It was after I was ahead of him that I started sliding.

Q. After you were ahead of him?

A. Sure.

Q. How close were you to that curve in the road there?

A. The curve?

Q. The curve where the road bends around.

A. Well, that there is about 50 yards away from the  
10 pole that I hit.

Q. In other words, you were coming to a curve that you would have to go around?

A. No, we was a mile away from that curve when I passed Mr. Butler. I passed Mr. Butler up there near the curve in Laurelton.

Q. And you were still a mile away from the curve when you passed Butler?

A. There is another curve further down where it slants down the hill. That is about a mile or three-quarters  
20 ters of a mile, something like that.

Q. Where this pole was broken off and your car was turned over on its side was right close to a curve, wasn't it?

A. Yes, that was about, I would say, about 50 yards away from the curve.

Q. And you had passed Butler, you say, a mile back?

A. I had passed Butler away back there towards the other curve.

30 Q. You said a mile back, didn't you?

A. I should judge a mile. I am not such a good judge of mileage and all that stuff.

Q. You have been driving on a regular route, that was your regular job, with an automobile that registers

miles, and you have to go certain places on your route so many miles apart from each other?

A. Sure.

Q. You can judge distance pretty well, can't you?

A. I judge it was almost a mile, sure.

Q. Having passed him almost a mile, the accident happened just as you were bearing down to go around the curve shown on P-8, didn't it? 10

A. Yes, sir, that's it.

Q. Where the men are standing is the pole that was put in to replace the one that was broken down?

A. Yes, sir, that's a new pole there.

Q. Put in place of the one that was broken? What were you doing while you were traveling that whole mile?

A. What was I doing? I was just driving.

Q. How fast?

A. 30 miles an hour?

Q. And you went a mile before you struck this place that you skidded? 20

A. I was 100 yards in front of Mr. Butler, 100 feet in front of Mr. Butler, before I started skidding.

Q. You don't mean that, do you? You didn't skid from a point a mile away from this curve less 100 feet all the way up to the curve, did you?

A. I didn't slide a mile, I know that.

Q. Well, you said you passed him a mile back from this curve, and that after you got by him 100 feet you began to skid or sway back and forth on the road and your last skid was about 100 feet until you fetched up against the pole, wasn't it? 30

A. Yes, that is it.

Q. Were you swaying or sliding or out of control all of that mile except that first hundred feet?

A. I think I was just swaying back and forth for about 150 feet before I hit the pole. That is all.

Q. For 150 feet.

A. About 100 or 150 feet.

A. About 100 or 150 feet.

Q. And the last 100 feet you were skidding, sliding, weren't you?

10 A. Sliding where?

Q. Skidding, slipping or sliding on the pavement and ice?

A. After I passed Mr. Butler I only slid about 150 feet before I hit the pole, but I was already past Mr. Butler about 100 feet.

Q. You were past him 100 feet?

A. About that. I don't know exactly how far behind he was.

20 Q. I was asking you about the skid now. There was only one last skid until you fetched up against the pole?

A. Sure.

Q. Was that 100 feet or 150 feet?

A. It was 100 feet or about 150. I am not a good judge of figures, even though I do drive a truck.

Q. Those poles were solid poles and practically new poles, weren't they?

A. I guess so. I don't know much about them. They looked new.

30 Q. Seeing them after the accident, seeing them every day after you rode by?

A. I wasn't on that road any more. I quit that road.

Q. You quit it after this accident, did you?

A. Sure. The accident scared me.

Q. It broke the pole completely off, didn't it?

A. Yes, I guess it did. There is a new pole up there.

Q. In other words, you skidded 100 feet or 150 feet out of control and still fetched up against the pole with force enough to snap off that telephone pole completely?

A. Yes, sir.

Q. What part of the car hit the pole?

A. The side hit the pole.

10

Q. The side hit the pole?

A. Sure.

Q. And back a mile from that curve you had only been going 30 miles an hour?

A. Yes, sir.

Q. Then had you picked up speed after that?

A. No, I was just going one speed all the way from Tom's River.

Q. When you started to skid 150 feet, you were not going over 30 miles an hour?

20

A. No, sir.

Q. That skid which broke off that telephone pole and carried you 150 feet started when you were only going 30 miles an hour?

A. Yes, sir.

Q. How do you know that car won't go at 40 miles an hour that you were driving?

A. The truck is governed for 40 miles an hour.

Q. I know, but how do you know it won't go more than 40 miles an hour?

30

A. I used to drive that truck regularly.

Q. And you had had it up to 40 miles an hour and found you couldn't go any faster?

A. Sometimes, sure.

Q. Why would you push it to its limit?

- A. Why would I push it?
- Q. Why would you push it up to the 40?
- A. That is just instinct. Anybody that drives a car would push it up once in a while.
- Q. Along the concrete on the right hand side of that road is yellow gravel, isn't it?
- A. Yes.
- 10 Q. Or ground stone and gravel. Which is it?
- A. I think it is just yellow gravel.
- Q. Anyhow, it is some rough dirt, some rough soil there, either gravel or crushed stone, something of that sort?
- A. Gravel. It isn't crushed stone.
- Q. About how wide is that shoulder there between the pole and the concrete?
- A. I guess that's about eight feet.
- Q. So that part of your skid and your slide side-
- 20 ways this 100 or 150 feet was through gravel, wasn't it?
- A. No, it was right on that asphalt road. As soon as I hit that there gravel, that is when the car swung and hit this here pole on its side. The wheels just slid right over after I hit the gravel.
- Q. You must have hit some part of the bank, too, didn't you?
- A. No, I didn't hit no part of the bank at all.
- Q. Just right against the pole?
- A. Right against the pole.
- 30 Q. When the truck hit that pole, the truck turned over on which side?
- A. The truck turned over on the left side.
- Q. It turned back towards Butler like?
- A. Yes.
- Q. You said a while ago, did you not, that having

crawled out from the truck itself, you crawled underneath this wire?

A. Sure, I did crawl under the wire.

Q. And the wire was partly over the concrete, and the end of the pole was partly over the concrete, wasn't it?

A. Yes. I don't think the pole was even resting against my truck.

Q. Irrespective of that, the top of the pole where it 10  
leaned out - - -

A. Yes. The wire was draped over part of the highway.

Q. When you crawled out under the wire, you were right up against your machine, weren't you?

A. Sure, right in front of it.

Q. And you crawled right on up along the machine under the wire until you came to the concrete, didn't you? You got up on the concrete itself?

A. I was on the concrete, because I crawled under 20  
the wire and then I stood on the concrete.

Q. When you crawled under the wire, you were on the concrete?

A. I didn't have to crawl under it. I just bent under it and stood on the concrete.

Q. Which is correct? On your direct examination you first said crawled.

A. Crawled is on your hands and knees.

Q. That is what you said on your direct examination. Isn't it correct? 30

A. If I said crawl, I just meant bending over, of course.

Q. You did crawl out from the truck, didn't you?

A. Yes.

Q. And you crawled out around the end of it?

A. Sure. I walked around the side and ducked under the wire.

Q. You straightened up on the concrete?

A. Sure, I stood right up.

Q. After you got on the concrete?

A. Yes.

10 Q. After Butler was down, then you saw the wire was burning the tires, did you?

A. Sure.

Q. The tire was smoking, the rubber was smoking? Was it in touch with any metal part of your car?

A. If it was I wouldn't have been here.

Q. Well, was it or wasn't it?

A. It was not, no, sir.

Q. And it wasn't in touch with any part of the ground?

A. No part of the ground.

20 Q. But it was low enough to be in touch with the tire so as to burn the tire, wasn't it?

A. Sure.

Q. You just indicated that you didn't crawl under it, but that you just stooped. You couldn't stoop as low as the height of your tire, could you?

A. Yes, I have already said that the wire was draped across the front wheels.

Q. Swinging down?

A. Yes, swinging down.

30 Q. And the lowest point was at the tire?

A. The tire. The tire was on the right hand side of the car and I went around to the left hand side of the car.

Q. The right hand side of the car if I understood you was down on the ground and the left hand side would be up in the air?

A. I beg your pardon. I think if he would read it to you, I said the left side was down.

Q. Was your car down on its side?

A. Sure the car was down on its side.

Q. On which side was it?

A. On the driver's side.

Q. On the left side?

A. Where I was driving, yes, sir.

10

Q. The left side was down on the ground?

A. Well, was that the side, the left? Yes, that is the left side.

Q. The left side was down on the ground?

A. Yes, sir.

Q. And the right side was up in the air?

A. The right side was up in the air.

Q. Was it straight up and down that way or not?

A. It was just laying flat on the ground.

Q. Flat on its side, and it was the tire that was up there in the air that the tire was resting on?

20

A. Yes, sir.

Q. Was the pole on the side towards Butler or the other side of your car?

A. It was on the other side of my car. I didn't even notice it, but I know it was there.

Q. Because of the excitement you didn't notice the pole?

A. All I noticed was the truck, that is all, and the returns.

30

Q. These men that you talked with that took you to some place to telephone the police, you say you served them with papers or served the people where you went to telephone?

A. I served the people where I went to telephone.

Q. You didn't know the people who took you to telephone?

A. No, I didn't know them at all.

Q. You are still working for this concern, although you don't drive the same route?

A. Yes, sir.

Q. January 7th, 1930 was on a Tuesday. You were  
10 mistaken about it being Sunday night.

A. It don't make no difference.

Q. You take return bundles any day, do you?

A. Any day up to Wednesday.

EDWARD McCAFFREY, SWORN.

Direct Examination.

By Mr. Eldredge:

20

Q. What is your full name, Mr. McCaffrey?

A. Edward McCaffrey.

Q. How old are you?

A. 23.

Q. Do you recall the morning of January 7th,  
1930?

A. I do.

Q. Will you tell us what happened and what you  
saw on this Laurelton Pike on that morning?

30

A. Well, the nearest I saw was the wreck.

Q. What wreck do you refer to?

A. Mr. Perry's News truck, overturned.

Q. Mr. Perry's truck?

A. Yes, sir.

Q. How did you happen to observe that wreck?

A. Well, I was coming towards it. I was on my way, to Beach Haven to work.

Q. Were you driving a car?

A. Yes, sir, Ford truck.

Q. Was anybody in the car with you?

A. Yes, sir, two men.

Q. Who were they?

A. Mr. Howell and Mr. Poland.

10

Q. When you came up there you say you saw the wreck. Explain to us exactly what you saw and what you did.

A. Well, as I approached the wreck, Mr. Perry stood on the concrete with his hand on the radiator cap, and as I went by him I spoke to him. I says, "Can I do you any good?" He says, "Nothing outside of a wrecker." He says, "You can't do me any good." I pulled over to the right of the road and went back.

Q. You got a little ways past him and pulled over and stopped and went back to him?

20

A. Yes.

Q. What did the other two men who were in the truck do?

A. They stepped out and started towards the wreck.

Q. Did you see Mr. Butler here?

A. I did.

Q. Where was he at that time?

A. He was coming down the right hand side of the road going east.

30

Q. Did you see his car stop?

A. Yes, sir.

Q. Where did his car stop with reference to where you had stopped your truck?

- A. On an angle from mine, a little further up than mine.
- Q. That is, a little beyond?
- A. A little west.
- Q. You hadn't quite reached the point where he stopped?
- A. No, sir.
- 10 Q. How far would you say that was from the wrecked truck?
- A. Anywheres from 50 to 60 feet. No further.
- Q. You got out with these other two men and walked down there and tell me what followed and what you saw.
- A. Well, as we went over, I don't know whether it was noseiness or what, we started to look at the back of the truck and there was a wire draped, and Mr. Howell went under it first and I went under second, and before Mr. Butler could get under there somebody hollered, "Duck,"
- 20 and I turned around and Mr. Butler was under the wire, as much as I know. I was back to him when it happened.
- Q. You were walking around to get at the rear of the truck with these other gentlemen?
- A. Just Mr. Howell alone.
- Q. And you heard somebody call, "Duck"?
- A. "Duck."
- Q. And you turned around and saw Mr. Butler caught on the wire?
- A. I did.
- 30 Q. Is that it?
- A. That is it.
- Q. Where was Mr. Perry at the time when that happened?
- A. Nearest to the truck.
- Q. Near the truck?
- A. Nearer to the truck, yes.

- Q. What was he doing?
- A. Well, I couldn't recall what he was doing, because I was face to the woods.
- Q. What had he been doing just prior to that?
- A. Talking to one another.
- Q. Had you said anything to Mr. Perry?
- A. Not outside of could I help him when I went by him. 10
- Q. When you said that to him, where was he?
- A. Standing on the concrete with his hand on the radiator cap.
- Q. Are you sure of that?
- A. Positive.
- Q. What happened after Mr. Butler got caught on this wire?
- A. Mr. Howell and I went up through the woods to where the wire was real high, after I seen what had happened. 20
- Q. You didn't want to take any chance?
- A. I didn't want to come back where I went under. I went up and went to where the wire was real high and came back to the road and went back, and as I approached Mr. Butler he fell over on the gravel.
- Q. Then what happened?
- A. Mr. Perry jumped in a car, just as it happened, to go telephone.
- Q. Did other cars come up and stop? 30
- A. Yes, they did.
- Q. Then what did you and the gentlemen with you do?
- A. We went on to work.
- Q. At the time you left there were other people and others cars there?

A. There was.

Q. Was the pole completely broken off?

A. It was.

Q. And how was it hanging at the time when you came up there?

A. It swung out in the road, and as it went back in the road the butt of it stuck in the bank.

10 Q. Did you see this wire?

A. I did.

Q. Was the pole resting on the truck or was it held suspended by the wire?

A. It was held suspended by the wire and the bank.

Q. And was the wire touching any part of the truck?

A. I wouldn't 'recall that, because I wasn't interested in that.

20 Q. And there is no doubt in your mind that Perry was out of the truck and out on the highway when you came by?

A. He was.

Q. Did you get there before or after Mr. Butler got there?

A. About the same time.

Q. You walked down the road more or less together?

A. Yes. He walked down and I walked across.

30 Cross Examination.

By Mr. Woodruff:

Q. Did you take Perry to the telephone to get the state police?

A. I didn't.

Q. Did you help get Butler in a car to send him to a hospital?

A. There was nobody made any attempt.

Q. Did you talk with anybody there except Perry?

A. Only the words I spoke to Perry is all.

Q. Did you talk to anybody else there at all?

A. Nobody.

Q. You then jumped in your machine and went off 10  
to work at Beach Haven?

A. Went to work at Beach Haven.

Q. Did you know Perry?

A. When I was a boy, real young, ten or eleven  
years old.

Q. So you didn't have to give him your name or  
anything like that?

A. He didn't know my name.

Q. He didn't know your name?

A. No. I hadn't seen Perry in seven or eight years. 20

Q. Didn't know where you lived?

A. No.

Q. And you didn't give him your name?

A. Just for seeing me around, is all.

Q. I mean you didn't give your name and your ad-  
dress to him there at that time?

A. No, I didn't give nobody nothing. I didn't  
speak to nobody.

Q. And nobody had talked to you until here in 30  
court about the case?

A. The other - - I was down here the other time  
when they didn't have no trial.

Q. Until you were subpoenaed, nobody talked to you  
about the case?

A. No, sir.

Q. Without having given your name, without having seen him for years, without him knowing your address, you were subpoenaed to come to court?

A. I was.

Q. Without having seen Perry in the meantime?

A. I would see him along the road, but never stopped to speak to him.

10 Q. Never stopped and told him where you lived after the accident?

A. Never spoke to him. He didn't interest me. I didn't think I was going to have any doings down here. I said, "Everything O. K.?" He said "Yes, you can't do me no good, outside of wrecking the truck," and I said "I am going to work."

Q. You didn't give your name or address to anybody there so they could find you?

A. No.

20 Q. Then you were subpoenaed to come to court?

A. Yes, I was.

Q. You never saw Perry or anybody for him in the meantime?

A. No, sir.

Q. You were going towards Beach Haven?

A. Yes, I was going towards Laurelton.

Q. Is that also towards Point Pleasant, in that general direction?

30 A. No, that is towards Lakewood. You have to turn off.

Q. You didn't offer to take the man to the hospital?

A. I had a lot of tools. I had no way to get him to the hospital.

Q. Did you stop anywhere along the line to telephone for help?

A. Mr. Perry went to telephone.

Q. But you didn't?

A. No.

Q. Went off to work?

A. Yes. I asked Mr. Perry if everything was O. K. and he said I couldn't do nothing.

Q. You haven't any idea how they found you to bring you here in this case?

10

A. No, sir.

Q. You gave no information how to find you?

A. No, sir. It slipped my mind. I didn't think there was going to be anything over it.

Q. You are sure you haven't talked to somebody?

A. No.

Q. Haven't given any statement and no signed information?

A. No. I am here and I am subpoenaed.

Q. And you live where?

20

A. Asbury Park.

Q. Don't you know Perry in Asbury Park, if you used to know him when you were a boy?

A. I know of him, but that is all. Never knew his name was Thomas Perry until I came in the courtroom. All I knew was his name was Perry.

Q. Do you know him to speak to when you see him on the street from day to day?

A. Not exactly. Only to nod my head to him. Not to hold a conversation with him.

30

Q. After this accident you never stopped him to ask him what became of the man?

A. Never bothered with him afterward.

Q. You saw Perry driving his truck?

A. Never seen him, no sir. I have seen another man on the Jersey Coast truck, but never saw Perry on a Jersey Coast truck since.

Q. You never saw him around Asbury Park?

A. No, sir. I work out of town mostly. I drive a truck myself and am never around outside of nights.

Q. Where did you know Perry as a boy?

A. On the golf grounds when I was real young. Used to caddy together.

Q. Where was that?

10 A. On the Deal Golf Grounds, outside of Asbury Park.

Q. When you came along, the first thing you saw was the wreck?

A. Yes, sir.

Q. Did you come around the curve?

A. Just as we came around the curve I saw the wreck.

Q. You didn't see the wreck until you came around that curve?

20 A. No, sir, I was just on the curve, or must have been when it happened, because I just spied it.

Q. At any rate, when you came around the curve where you could see down the road, the wreck had already happened?

A. Yes, sir.

Q. The machine was up on its side and the pole was down already when you came around?

A. Yes, everything. Mr. Perry was on the concrete.

30 Q. Irrespective of that, the first thing you saw was the car on its side with the pole down, was it?

A. I did.

Q. That had already happened before you came around that curve?

A. Yes.

Q. Where was Butler's machine stopped?

- A. When he went to the scene?  
Q. Where was his car standing?  
A. On an angle from mine; more west.  
Q. Where with respect to the wreck?  
A. West of the wreck.  
Q. That is beyond the wreck the way you were coming?  
A. Yes. 10  
Q. How far from the wreck?  
A. Anywheres from 50 to 60 foot.  
Q. Right side or left side of the road as he was going?  
A. Right side as he was going.  
Q. Off the concrete or not?  
A. No, sir, on the concrete.  
Q. And you went past that before you stopped, or not?  
A. Yes, sir, just by it, so if anything wanted to go by. 20  
Q. And you didn't go to the wreck until after you had gone past Butler's car?  
A. No, sir, I hadn't gone past Butler's car.  
Q. Opposite his car?  
A. I was on an angle. He was further west than I was.

Re-Direct Examination. 30

By Mr. Eldredge:

- Q. Your truck where you stopped it was closer to the wrecked truck than Mr. Butler's car was; is that it?  
A. Exactly. I was across the street and Butler was on the right hand side. About the same.  
Q. You were almost opposite each other?

A. No, we wasn't, but we were about the same distance from the wreck, because I was on an angle from it and he was straight off west.

WILLIAM HOWELL, sworn.

Direct Examination.

10

By Mr. Eldredge:

Q. What is your full name, Mr. Howell?

A. William Howell.

Q. Where do you reside?

A. Asbury Park.

Q. How old are you?

A. 38.

20 Q. Are you the Mr. Howell who accompanied Mr. McCaffrey that morning in the truck?

A. Yes, sir.

Q. The morning of January 7th, 1930?

A. Yes, sir.

Q. As you came around this curve in the truck that morning, what did you see?

A. I saw the Jersey News Company's wreck there and Mr. Perry with his hand on the radiator cap.

Q. Who else was with you and McCaffrey?

A. Mr. McCaffrey and Mr. Poland.

30 Q. Who was Mr. Poland?

A. My boss.

Q. Do you still work for Mr. Poland?

A. Yes, sir.

Q. Do you know whether he is here today or not?

A. He is sick.

Q. Had you ever seen Perry before that morning?

A. Never.

Q. Have you seen him since until you saw him here in court?

A. No, sir.

Q. Tell us just what happened and what you did and what you saw.

A. Well, I saw this News truck, and got out and 10  
looked at it a while.

Q. It was over on its side?

A. Over on its side.

Q. What was the condition of the pole and the wires?

A. The pole was drooped out towards the road a little.

Q. Was it broken off?

A. Yes, it was broken off and stuck in and drooped 20  
out like that.

Q. Did you see the broken pole and the wires?

A. Yes, sir.

Q. Did you notice where the wire was in connection with the machine?

A. The drooped wire?

Q. Yes.

A. It drooped from one pole down to the other, just like that.

Q. Did it touch any part of the machine, do you 30  
recall?

A. No, sir, I can't recall.

Q. Do you recall whether it was in front or in back of the machine, the wrecked truck? Can you recall that?

I guess you don't understand my question. The wrecked machine, as I understand it, was heading straight out or almost straight out towards the highway?

A. Almost straight out.

Q. Would you say that as the wire drooped down it drooped down over the front part of the machine or in front of it or back?

10 A. Over the front part of the machine.

Q. What did you do? You went by the wrecked truck in the automobile which Mr. McCaffrey was driving?

A. Yes, sir.

Q. You were riding there with him in the front seat?

A. Yes, sir.

Q. What did you do after you got past the wrecked truck?

20 A. I got out and walked over towards Mr. Perry's car.

Q. Who else was with you?

A. Mr. McCaffrey.

Q. Was Mr. Poland there, too?

A. Yes, Sir.

Q. Did you see Mr. Butler, the plaintiff?

A. Yes, Sir.

Q. When did you first see him?

A. Well, as I walked over towards the car, he was  
30 walking down the road towards me.

Q. Where was his car? Did you see his car come to a stop or not?

A. Yes, sir, I seen his car come to a stop.

Q. Did his car come to a stop before or after you got out of your truck?

- A. Both stopped about the same time.
- Q. How far apart from each other was your car and Mr. Butler's car?
- A. Pretty near exactly opposite.
- Q. On opposite sides of the road, and on a little angle?
- A. Yes, sir.
- Q. You walked down to see this wreck, did you? 10
- A. Yes, sir.
- Q. Where was the driver, Mr. Perry, at that time?
- A. When I got to the wreck?
- Q. Yes.
- A. He had his hand leaning on the car, on the radiator cap.
- Q. In front of his truck?
- A. Yes, sir.
- Q. Was he standing on the concrete part of the highway? 20
- A. Yes, sir, standing right on the edge of it.
- Q. Did he appear to be injured or hurt?
- A. No, sir. I never said nothing to him and he never said nothing to me.
- Q. Was Mr. Butler there, too, at that time?
- A. Yes.
- Q. What did you do next?
- A. I walked underneath the wire, the first man under it, and Mr. McCaffrey came under it next, and then somebody hollered, "Duck," and I turned around to look and there was Mr. Butler fast to the wire. 30
- Q. Do you know who it was that holloed, "Duck"?
- A. I ain't positive, no, sir, because I was back to them, going towards the woods.

Q. Did you recognize whose voice it was? If you know, of course?

A. Well, it sounded like Mr. Poland's, but I couldn't say sure.

Q. It sounded like Mr. Poland's voice crying, "Duck"?

A. Yes, sir.

10 Q. You turned around and there was Mr. Butler caught on this wire?

A. Yes, sir.

Q. What happened after that?

A. Then me and Mr. McCaffrey went up where the wires was high and came across the road and back to Mr. Butler, and then Mr. Butler was down on the ground with his face, his chin in the gravel, half on the gravel and half on the highway.

Q. What did Mr. Perry do?

20 A. Then Mr. Perry went down to the Laurelton store and telephoned.

Q. You don't know that. He got in an automobile did he, and went away?

A. Yes.

Q. That is all you know?

A. Yes.

Q. Were other cars coming up and were people stopping?

30 A. Yes, there were a couple of cars came up and some young fellows got out, and then me and Mr. McCaffrey went on to work.

Q. How seriously did you think Mr. Butler was injured at the time?

A. I couldn't exactly tell you, but when I turned around and saw him, his hair was burning, and then after

that I went around and he was back to me, face on the ground, and I couldn't see the other part of his head.

Q. Did you think he was alive or dead?

A. Well, to tell you the truth, I thought the man was dead.

Q. What did you and Poland and McCaffrey do next?

A. When we seen he had plenty of aid and after 10 Perry told Mr. McCaffrey he didn't think he could do anything for him, we went on to work.

Q. And that is all you know about it?

A. Yes, sir.

Cross Examination.

By Mr. Woodruff:

Q. Did you go right on to work after Perry said he 20 didn't need any aid?

A. Yes, sir.

Q. Did you do anything about lifting Mr. Butler up?

A. No, sir.

Q. Examine him at all?

A. No, sir.

Q. Did you see the old man taking care of him, Mr. Miller?

A. Mr. Miller stood there, yes, sir.

Q. You saw him lifting Butler around, didn't you, 30 to help him?

A. No. He never touched him while I was there.

Q. He was still on the ground there where he had fallen when you went away?

A. Yes, sir.

Q. Nobody had even turned him over to look at him?

A. Not while I was there, no, sir.

Q. You went off to your work before he had even been examined that much?

A. Yes, sir.

10 Q. To see whether he was alive or dead? Perry said he didn't need any help and you went off to work, leaving that situation as you have now described it, with the man on the ground and he not even having been turned over?

A. Yes, sir.

Q. You didn't give your name, did you?

A. My name?

Q. There at the time?

A. Not there at the time, no, sir.

20 Q. Your boss didn't give his name there at the time, did he?

A. Not that I know of.

Q. As soon as this young man said he didn't need any help, you went off?

A. Yes, sir.

Q. You were here before when this case was to have come up to be tried, weren't you?

A. Yes, sir.

Q. Here in court?

A. Yes, sir.

30 Q. And you were here with the young man who was just on the stand?

A. Yes, sir.

Q. And you did talk to somebody at least that time about this case, didn't you, when you were here?

A. No, sir.

Q. You didn't see anybody in connection with the case?

A. No, sir.

Q. You didn't tell anybody what you saw?

A. No, sir.

Q. You didn't talk to this man sitting here beside counsel?

A. No, sir.

10

Q. Didn't even meet him?

A. No, sir.

Q. Nobody ever came to you and got a statement?

A. No, sir.

Q. Just subpoenaed you out of a clear sky and brought you here?

A. Yes.

Q. You don't know Perry?

A. No, sir.

Q. Never saw Perry?

20

A. Never saw Perry before.

Q. And haven't seen him since?

A. Not until today.

Q. I mean you have never seen him since to tell him you saw this accident and where he could find you?

A. No, sir.

Q. You never told his boss, the newspaper company or whatever it is?

A. No, sir, I don't even know the man.

Q. Never sent any word to them who you were and where you could be found?

30

A. No, sir.

By Mr. Eldredge:

Q. Mr. Howell, Mr. Poland, your employer, his name was on that truck, wasn't it?

A. Yes, sir.

Q. And the address was on the truck?

A. Yes, sir.

DEFENDANT RESTS

10 PLAINTIFF'S TESTIMONY IN REBUTTAL

JOSEPH A. MILLER, recalled.

Direct Examination.

By Mr. Woodruff:

Q. Mr. Miller, when you were coming up to the scene back of Mr. Butler and you saw Mr. Butler go down  
20 into the roadway and this other man crawling out, was there any other machine that had stopped then or any other men there?

A. Not that I saw. I didn't notice any there.

Q. Were there men up there at the machine walking around and all that sort of thing?

A. No, sir, not to my knowledge. I didn't see anybody.

30

TESTIMONY CLOSED.

(The following motion was made in Chambers:)

MOTION TO DIRECT VERDICT

Mr .Eldredge: If Your Honor please, I move for the direction of a verdict in favor of the defendant on the entire record, on the same grounds that were previously urged on the motion to strike and motion to grant a nonsuit, as follows: The defendant was not guilty of actionable negligence to the plaintiff; the plaintiff voluntarily assumed the risk of the injury which he received or he was guilty of contributory negligence; the defendant's conduct was not the legal cause of the plaintiff's injury. 10

The Court: I will deny the motion.

20

(Exception noted for defendant.)

A recess was taken until 1:15 P.M.

Afternoon session 1:15 P.M.

(Counsel for the respective parties argued the case to the jury.)

30

## COURT'S CHARGE TO JURY.

Sooy, J. Ladies and gentlemen of the jury: When you go out to the jury room, you will have with you the pleadings that have been filed in this case, insofar as those pleadings are necessary for your enlightenment.

10

You will find that the plaintiff started this suit by filing what we lawyers call a complaint, and in that complaint the plaintiff asks from the defendant damages, and he says he is entitled to those damages because the defendant, through its servants and agents, was negligent. It will be important for you to look over the complaint so that you may determine what allegations of negligence the plaintiff makes against the defendant, and also to determine the circumstances under which he says this accident happened, as those circumstances are set forth in the complaint.

20

After you have done that, you will observe the answer filed by the defendant, and you will notice the defendant denies that it was negligent, through its servants or agents or otherwise, and also sets up other affirmative defenses, and says that even if you should find on the main case that the defendant, through its servants and agents, was guilty of negligence, still the plaintiff would not be entitled to recover, because he was guilty of contributory negligence which would bar his recovery; and because he was injured, not as a result of the negligence of the defendant, but by reason of his failure to observe the obvious risk.

30

All of the allegations of the complaint and the answer are for you.

You will observe that the plaintiff does not expect to recover and knows he has no legal right to recover merely because he has sustained physical injury. In other words, the mere fact that he was burned as a result of the electric shock, standing alone, does not entitle him to anything, and that is the reason that in his complaint he says that the defendant was guilty of negligence and that negligence caused his injury.

10

In order for the plaintiff to recover, he must establish by the greater weight of the believable evidence first that the defendant was negligent, and second, that that negligence was the proximate cause of the injuries sustained by the plaintiff. He must establish that by the greater weight of the believable evidence.

You are the sole judges of the facts, and it is for you to determine whether or not the plaintiff, by the greater weight of the believable evidence, has established, first, that the defendant was guilty of the negligent act or acts alleged against it in the complaint, and secondly, whether that act or acts of negligence were the proximate cause of the plaintiff's injuries.

20

By the greater weight of the believable evidence is meant that you shall consider all the evidence in the case that is offered by both sides, and all of the fair inferences that arise from the proved facts, and you weigh in the scales of justice, as it were, the evidence in favor of the plaintiff and the evidence in favor of the plaintiff. If the scales are in equipoise, that is, balanced, then the plaintiff has not carried the burden of proof and cannot recover. If they dip ever so slightly in favor of the plaintiff, he is

30

said to have carried the burden of proof; and of course, it it goes without saying that if they dip in favor of the defendant, the plaintiff has not carried the burden of proof.

So that the first question you are going to be concerned with after you get in the jury room is, Has the plaintiff established by the greater weight of the believable evidence  
10 that he sustained his injuries as a result of negligent conduct on the part of the driver of the defendant's truck? That is not such a hard proposition as it might seem for jurors who have never sat before. Of course, negligence arises when there is a failure to perform a duty or a mal-performance of duty, a bad performance of duty. In this case the plaintiff says that the defendant failed in its duty to the plaintiff, and that that duty was to operate and drive its car as it attempted to pass the automobile of the plaintiff in a reasonably careful and prudent manner. So  
20 the question is, Did the defendant through its servants and agents on the day in question, at the time and place in question, in view of all the conditions with which he was confronted, the state of the weather, the state of the road, did the defendant's driver operate and control his automobile as he endeavored to pass the plaintiff as a reasonably careful and prudent person would and should have done under those circumstances and conditions? If he did operate the defendant's truck as a reasonably careful and prudent man would and should have done under the  
30 circumstances and conditions with which he was confronted, and you so find from the testimony, the plaintiff cannot recover.

If you find that he did not so operate and control the defendant's truck, you go on to the next question, and you

say, Did that failure of the defendant's driver to exercise that reasonable care with which he was charged proximately cause the plaintiff's injuries? By proximate cause is meant that cause which naturally and probably led to and which might have been expected to produce the accident. It is the efficient cause, the cause which necessarily sets the other causes in motion.

10

If you have found that the driver of the defendant's truck failed to operate it as a reasonably prudent person would and should have done, do you also find that his failure so to operate it was the efficient cause, proximate cause of plaintiff's injuries, or was there another and more controlling cause?

That question is a question of fact for you to determine under the testimony, and as I say, if you apply those common sense ways of getting at it, it does not seem to be so difficult. When you say a reasonably prudent person, you mean the ordinary person, the everyday man, and when you say reasonable care, you mean that care which the ordinary person engaged in a like undertaking, under like circumstances and conditions, usually exercises.

20

If you have found after your careful consideration of the testimony, that the defendant was guilty of negligence, and that negligence was the proximate cause of the plaintiff's injuries, you will have to go a step further. If you find against the plaintiff on that, your verdict will be no cause of action.

30

The next point in the evidence - - to which I have not referred as yet, and which would be proper to refer to either as I charge on the plaintiff's case or on the defend-

ant's case—I will bring up in connection with the affirmative defense of the defendant. It says, as I have told you, first that it was not guilty of negligence which was the efficient cause of the plaintiff's injuries, and it says that even if you do find against it on that fact, that still the plaintiff cannot recover because he was guilty of contributory negligence. In other words, that he himself was negligent, and  
10 negligent in such a manner that if he had not been negligent he would have received no injury from the negligence of the defendant. That is an affirmative defense, and the burden of proving that defense is on the defendant. The defendant says the plaintiff was guilty of negligence himself in such a manner that had he not been negligent he would have received no injury by reason of the negligence of the defendant. That again is not such a hard proposition to deal with, because the question you have to answer in determining it is a simple one, and practically the same  
20 question you have asked on the plaintiff's case. Scrutinizing the plaintiff's actions at and about the time of this accident, did he conduct himself as a reasonably prudent person would and should have done under the circumstances with which he was confronted and the conditions with which he was confronted at and about the time he received these burns? If he failed to exercise that reasonable degree of care with which the ordinary person is charged under like circumstances and conditions, and his failure so to do contributed to the accident and the subsequent in-  
30 juries that he sustained, then he cannot recover.

And let me call your attention right here to this proposition of law: The law does not deal with degrees of negligence. It does not permit the jury to say, "Yes, the defendant was guilty of negligence; yes, the plaintiff was

guilty of negligence; but we find that one side was guilty of the greater negligence and therefore we will find a verdict in favor of the person guilty of the lesser negligence." You cannot do that. The law does not deal with degrees of negligence. If the defendant was negligent and its negligence was the proximate cause of the injuries sustained by the plaintiff, and the plaintiff was guilty of a lesser degree of evidence which contributed to the cause of this accident and the injuries he sustained, he cannot recover. 10

In order to determine whether or not the plaintiff himself was guilty of contributory negligence, you have an allegation in the complaint that as the plaintiff drove along the road, suddenly and without warning—and it would seem to me the question of warning is of very little moment—an automobile passed him on his left, and the plaintiff says that automobile was going at a high rate of speed, and at some point in the progress of defendant's automobile it skidded, that it went into a light pole, knocked it down, and that the driver of that truck was entangled or enmeshed or in some way pinned under that automobile, and that the plaintiff, seeing the predicament of the driver of that truck, and moved by a desire to render his fellow man a service, by a desire to rescue him, hastened to the scene, and while in an attempt to rescue, was burned. 20

The other side of that picture you must also consider and take into consideration the testimony of the witnesses for the defense, who say that when that automobile was turned over and when they got to the scene, which was about the same time the plaintiff got there, the driver of that truck was not under it at all, but that he was out on 30

the concrete, as I remember it, and that he was not in need of being rescued.

In the first place, was there an attempt at rescue on the part of the plaintiff, or was the driver of that truck in position so that he did not need to be rescued and so that it was obvious he did not need to be rescued? I think it is  
10 important that you should decide that point at the outset of your inquiry as to the contributory negligence of the plaintiff, because what a reasonable person, an ordinarily prudent person should do is circumscribed to a large extent by the conditions with which he is confronted. If the plaintiff as he approached the scene of this overturned automobile saw under it a man in imminent peril, and thru humane motives he rushed to his assistance, he would only be chargeable with that degree of care which the ordinarily prudent person would exercise on a like mission and under  
20 like circumstances and under like conditions; but if, instead of doing whatever he did do with the laudable intention of a rescue, he saw this driver standing on the road, without need of rescue, then his conduct must be tested by the circumstances and conditions with which he was surrounded under those circumstances and not under the rescue circumstances.

So you see after all is said and done it is a question of fact for your consideration, and the ultimate result  
30 must depend on how you decide these various propositions which I have outlined to you, not with the idea of taking from you other propositions you may realize are in the case, but merely for the purpose of assisting you, if I can, in arriving at a conclusion and a verdict that will be four-square with your oaths and justice.

You and I are fortunate in that we do not have to pay the judgment or do we have to suffer the disappointment in not receiving a judgment. All we have to do, fortunately, is to go home satisfied that we have performed the duty that we have been called upon to perform.

So in this case it is your duty to render a verdict as you see it should be rendered, not influenced by sympathy 10 for the defendant, but solely guided by the testimony.

I am requested to charge several requests. I will take the plaintiff's up first.

Number One I refuse to charge because it seems to me that the traffic act quotation has no direct import insofar as the present date is concerned.

Number Two: "The driver of an automobile wishing 20 to pass another ahead proceeding in the same direction must use reasonable care under the conditions confronting him and to ascertain whether he can pass the vehicle ahead with safety." I do charge that and have already charged it.

Number Three: "Every person operating a motor vehicle who shall knowingly be involved in an accident shall at once stop and ascertain the extent of the injury and render such assistance as shall be needed." I so charge 30 you that that is what the statute says, but that statute would not excuse the lack of ordinary care as I have defined ordinary care to you in the charge. In other words, the statute does not fix the liability in this case. The question of the reasonable degree of care exercised by the plain-

tiff and by the defendant, as I have charged, is that from which you may fix the liability.

Number Four I have already charged.

Mr. Woodruff: Number Five you have also charged.

10 The Court: Number Six: "Every person having occasion to use the public highways of the state is entitled to feel that he is absolutely safe, while using ordinary care, and if one renders its ordinary use dangerous, he is legally answerable for injuries directing resulting therefrom to a lawful user of such highway." I so charge.

20 Number Seven: "Mr. Butler would not be guilty of contributory negligence in exposing himself to danger of injury in order to rescue another from imminent danger of personal injury or death, if under the circumstances an ordinarily prudent person might have so exposed himself." I so charge. That is what I have charged you before.

The defendant asks me to charge as follows:

Number One I refuse to charge because it is too involved.

30 Number Two I refuse to charge excepting as charged.

Number Three: "If you believe that a reasonably prudent man under all the conditions and circumstances would have seen and avoided the wire which the plaintiff struck, and believe that the plaintiff came in contact with

the wire as a result of his own carelessness, your verdict should be for the defendant." I so charge you.

Number Four I refuse to charge because I have already charged that the proximate cause is the controlling feature.

If you find for the defendant, your verdict will be no cause of action. 10

If you find for the plaintiff, the plaintiff is entitled to a money verdict in a lump sum; that lump sum, whatever it may be, to be compensation, pay, just compensation, for the bodily injury that the plaintiff has sustained as a result of the injuries in this accident. Secondly, for the pain and suffering that he has undergone as the result of those injuries. Thirdly, for the effect on his health caused by those injuries, according to its degree, as likely to be temporary or permanent. Fourthly, for the moneys he has expended in an attempt to cure himself of his injuries, which would include hospitalization, doctor's bills and other bills of like character which have been proved by the evidence. Fifthly, for the moneys that he has lost or may lose in the future, if there is evidence of inability to attend to his business, that inability caused by injuries sustained in this accident. 20

I know of no other elements of damage that have been attempted to be proved in this case, and I call your attention to the fact that none of these elements of damage should be awarded excepting upon evidence that justifies the award. In other words, you do not just simply reach up in the air and say, "We will award so much," but 30

award what the proof makes you believe will be reasonable compensation for those elements of damage which have been proven.

I have said to you that your award of damage, if you find for the plaintiff, is not confined necessarily to damages which have already been sustained, but that they may  
10 extend into the future. Supplementing that, I want to say that there can be no award for future loss (excepting upon evidence that makes the future loss reasonably certain, and that the measure of that future loss will be the present value.

20

30

DEFENDANT'S EXCEPTIONS

Mr. Eldredge: Defendant excepts to that part of the Court's charge to jury wherein the Court charged the third request made by the plaintiff as follows: "Every person operating a motor vehicle who shall knowingly be involved in an accident shall at once stop and ascertain the extent the injury and render such assistance as may be needed." 10

(Which exception is hereby noted.)

Mr. Eldredge: Defendant excepts to that part of the Court's charge to jury wherein the Court charged the sixth request made by the plaintiff as follows: "Every person having occasion to use the public highways of the state is entitled to feel that he is absolutely safe, while using ordinary care, and if one renders its ordinary use dangerous he is legally answerable for injuries directly resulting therefrom to a lawful user of such highway." 20

(Which exception is hereby noted.)

Mr. Eldredge: Defendant excepts to that part of the Court's charge to jury wherein the Court charged the seventh request made by the plaintiff as follows: "Mr. Butler would not be guilty of contributory negligence in exposing himself to danger of injury in order to rescue another from imminent danger of personal injury or death, if, under the circumstances, an ordinarily prudent person might have so exposed himself." 30

(Which exception is hereby noted.)

Mr. Eldredge: Defendant excepts to the Court's refusal to charge the defendant's first request in the language following: "If you find that the defendant's truck, at the time it passed the plaintiff was under proper control, and did not get out of control until it was completely past the plaintiff, and some distance ahead of him, your verdict should be for the defendant."

10 (Which exception is hereby noted.)

Mr. Eldredge: Defendant excepts to the Court's refusal to charge the defendant's second request in the language following: "If you believe that the plaintiff received his injury after the defendant's driver, Perry, was out of the truck and standing safely on the highway, your verdict should be for the defendant."

(Which exception is hereby noted.)

20 Mr. Eldredge: Defendant excepts to the Court's refusal to charge the defendant's fourth request in the language following: "If you believe that the manner in which the defendant's truck was driven past the plaintiff's car was not a substantial or material factor in causing the injuries the plaintiff received your verdict should be for the defendant."

(Which exception is hereby noted.)

30 Mr. Eldredge: Defendant excepts to that part of the Court's charge to jury wherein the Court said that the test of the reasonably prudent man is the ordinary man or the ordinary person insofar as that applies to the contributory negligence in this case.

(Which exception is hereby noted.)

JUDGMENT

(Filed April 22, 1931)

This case was tried before William Frank Sooy, Judge, with a jury at the Cape May Circuit, on April 14th and 15th, 1931. 10

The jury rendered a general verdict against the defendant and in favor of the plaintiff, Benjamin F. Butler, in the sum of Five Thousand Dollars (\$5,000.00).

Damages . \$5000.00 Costs . . . . 70.32 <hr style="width: 10%; margin-left: 0;"/> \$5070.32	Whereupon it is adjudged that the plaintiff Benjamin F. Butler do recover of the said defendant Jersey Coast News Co., a corporation of the State of New Jersey the sum of Five Thousand Dollars damages and Seventy dollars and thirty-two cents costs, making in the whole the sum of Five Thousand seventy dollars and thirty-two cents.	20
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Judgment signed and entered April 22, 1931.

WM. S. GUMMERE, C.J. 30

## NOTICE OF APPEAL AND GROUNDS

## NEW JERSEY SUPREME COURT

## CAPE MAY COUNTY

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BENJAMIN F. BUTLER, <i>Plaintiff.</i>	}	Action At Law. NOTICE OF APPEAL and GROUNDS
vs.		
JERSEY COAST NEWS Co., A corporation of the State of New Jersey. <i>Defendant.</i>		

To ALBERT S. WOODRUFF, ESQUIRE, and

20

WILLIAM HARRIS, ESQUIRE,

*Attorneys of Plaintiff:*

Take notice, that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals, in the last resort in all causes in New Jersey, on the following grounds:

30

1. Because the New Jersey Supreme Court refused a motion to strike the complaint, based on the following reasons:

- (a) It fails to show that the defendant was guilty of actionable negligence.
- (b) It shows on its face that the plaintiff voluntarily assumed the risk which resulted in his injury.

- (c) It shows on its face that plaintiff was guilty of contributory negligence.
- (d) It fails to show that defendant's conduct was the legal cause of plaintiff's injury.

2. Because the New Jersey Supreme Court refused defendant's motion for a non-suit, which motion was made on the grounds that:

10

- (a) The proofs offered by the plaintiff failed to show that the defendant was guilty of actionable negligence towards the plaintiff.
- (b) The proofs offered by the plaintiff showed that the plaintiff was guilty of contributory negligence.
- (c) The proofs offered by the plaintiff showed that the plaintiff voluntarily assumed the risk which resulted in his injury.
- (d) The proofs offered by the plaintiff failed to show that the defendant's conduct was the legal cause of the plaintiff's injury.

20

3. Because the New Jersey Supreme Court refused the defendant's motion to direct a verdict for defendant which motion was made on the grounds that:

- (a) The whole of the record fails to disclose that the defendant was guilty of actionable negligence to the plaintiff.
- (b) The whole record discloses that the plaintiff was guilty of contributory negligence.
- (c) The whole record discloses that the plaintiff voluntarily assumed the risk which resulted in his injuries.
- (d) The whole record fails to disclose that defend-

30

ants' conduct was the legal cause of the plaintiff's injury.

4. The Court charged the Jury:

10 "Every person operating a motor vehicle who shall knowingly be involved in an accident shall at once stop and ascertain the extent of the injury and render such assistance as may be needed."

5. The Court charged the Jury:

20 "Every person having occasion to use the public highways of the State is entitled to feel that he is absolutely safe, while using ordinary care, and if one renders its ordinary use dangerous he is legally answerable for injuries directly resulting therefrom to a lawful user of such highway."

6. The Court charged the Jury:

30 "Mr. Butler would not be guilty of contributory negligence in exposing himself to danger of injury in order to rescue another from imminent danger of personal injury or death, if, under the circumstances, an ordinarily prudent person might have so exposed himself."

7. The Court refused to charge the Jury:

"If you find that the defendant's truck at the time it passed the plaintiff was under proper control and did not get out of control until it was completely passed the plaintiff, and some distance ahead of him, your verdict should be for the defendant."

8. The Court refused to charge:

“If you believe that the plaintiff received his injury after the defendant’s driver, Perry, was out of the truck and standing safely on the highway, your verdict should be for the defendant.”

9. The Court refused to charge:

10

“If you believe that the manner in which defendant’s truck was driven past the plaintiff’s car was not a substantial or material factor in causing the injuries, the plaintiff received your verdict should be for the defendant.

T. MILLET HAND,  
*Attorney for and of counsel  
with Defendant.*

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30

## NOTICE OF ARGUMENT

(Filed August 17, 1931)

## NEW JERSEY COURT OF ERRORS &amp; APPEALS

10 BENJAMIN F. BUTLER,  
 Plaintiff-Appellee  
 vs.  
 JERSEY COAST NEWS Co.,  
 A New Jersey Corporation,  
 Defendant-Appellant

ACTION AT LAW  
 NOTICE OF  
 ARGUMENT

To ALBERT S. WOODRUFF, ESQUIRE, and WILLIAM  
 HARRIS, ESQUIRE, attorneys of the plaintiff-appellee.

20 Please take notice that the argument of the appeal in  
 the above entitled cause will be brought on at the next  
 term of the Court of Errors and Appeals, to be heard at  
 the State House at Trenton, on the 20th day of October,  
 1931, at the hour of eleven o'clock in the forenoon, or as  
 soon thereafter as counsel can be heard.

Dated August 11, 1931.

30

T. MILLET HAND,  
 Attorney for and of counsel with  
 Defendant-Appellant.

NEW JERSEY COURT OF ERRORS and APPEALS

BENJAMIN F. BUTLER,  
Plaintiff-Appellee

vs.

JERSEY COAST NEWS Co.,  
(A Corporation of the State of New Jersey)  
Defendant-Appellant

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On Appeal from the New Jersey Supreme Court  
(Sat below: HON WILLIAM FRANK SOOY, C. C. J).

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Brief for the Defendant-Appellant, and Points.

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FACTS.

The facts, which for the purpose of this brief are taken wholly from the testimony of the witnesses of the Plaintiff-Appellee, are as follows:

On the day of the accident the plaintiff, Benjamin Butler, accompanied by one Joseph Miller, were proceeding in an automobile operated by Benjamin Butler, from Atlantic City to Atlantic Highlands. The road was slippery "most all the way." The weather was not overcast, but there was mist in damp places. Between seven and eight o'clock in the morning, at a point on the cement highway between Laurelton and Point Pleasant, where the surface of the highway was glazed with ice, the plaintiff was driving in the middle of the right side of the road at 25 miles per hour. There were no other cars on the highway at this time and place except the truck driven by the ser-

vant of the Defendant, which passed the plaintiff on the left side of the road at a rate not "less than 50 or 60 miles an hour." After the Defendant's truck "pulled out around" plaintiff's car, and undertook to "come up in front of" plaintiff again, and "as" Defendant "got by" Plaintiff, Defendant commenced to skid, and continued to do so for 500 or 600 yards. (S. C. 18). Defendant then went off right side of road, struck a telegraph pole, which came down on the highway, bearing wires charged with electricity. Defendant's car overturned. Plaintiff stopped his car some 50 feet from the accident, and went over and started to help defendant's servant out of defendant's overturned car (S. C. 20). Plaintiff thereupon came into contact with wire, without having seen it, and was injured.

At the time when Defendant's car skidded off the road, Plaintiff's car was 250 or 300 yards in the rear. (S. C. 42). At the time when Plaintiff started to help Defendant's servant, "he was apparently crawling out from under the wreck, or trying to" (S. C. 83). The wire with which Plaintiff contacted was attached to the pole, but it is not known whether it was over the truck or not. (S. C. 93 l. 12.) (S. C. 13 l. 20.)

#### POINT 1.

The first point raised by the appellant is based upon the refusal of the Supreme Court to strike the complaint, because it failed on its face to show that the defendant was guilty of actionable negligence. (S. C. 164-l. 29-33).

#### ARGUMENT.

1. *The defendant was not guilty of actionable negligence.*

(a) *The defendant could not foresee that his conduct created a probability of injury to the plaintiff*

The plaintiff's evidence discloses that defendant's truck had safely passed plaintiff's automobile. It was not until after it had so passed, and was coming back to the right side of the highway that it commenced to skid, and continued to skid or zig-zag for 500 or 600 yards, before leaving the highway and striking the pole; and further that at the time of striking the pole, the plaintiff's car was 250 or 300 yards safely in the rear. The proofs further disclose that there were no other cars on the highway. (S. C. 18 l. 8). Nor was there any proof that the highway at this point was heavily traveled.

It is elementary that a jury could not be permitted to find that driving an automobile at a speed likely to cause skidding is in itself negligence; nor skidding. The question is not whether the truck was being driven at a speed of ten, twenty or thirty miles per hour over an icy road. In determining whether the defendant violated any legal duty, the question is whether a reasonably prudent man would have foreseen an unreasonable probability of injury to others in driving the truck in such a way that it was not unlikely to skid.

But this, in itself, is not enough. "Proof of negligence in the air, so to speak, will not do.": *Pollock on Torts*. 12th Ed. 456.

Before the plaintiff can contend that the defendant has been guilty of any actionable negligence, so far as the plaintiff is concerned, he must show not merely that the defendant has driven his truck carelessly, or at an improper rate of speed, but that to the eye of reasonable vigilance such driving created an unreasonable probability of injury to this plaintiff. No principle in the law of Torts is more fundamental: 20*R. C. L.* 47; *Pollock on Torts*, 18th Ed. (1923) 456; *Bohlen's Studies in the law of Torts*, 15, 16 (1926).

Thus, Professor Bohlen, who is reporter for the American Law Institute, in restating the law of Torts, says at page 15 of his Studies:

“Even though an act be wrongful as a misdemeanor against the Commonwealth, or as threatening injury to a third party, it is not negligent as to the plaintiff unless it could and should have been foreseen as likely to injure the plaintiff himself. He cannot, by tacking on to his injury a wrong to the public, or the failure to observe a measure of care due to another, acquire a right of action.”

The New Jersey authorities are in full accord with this view.

In *Kahl v. Love*, 37 *New Jersey Law Reports*, 5 (1874), Chief Justice *Beasley* said at page 8:

“It is not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine relating to actionable negligence is, that *the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss.* Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and *litigious intricacies*, if the ill effects of the negligences of men could be followed down the chain of results to the final effect. Under such a doctrine, the careless manufacturer of iron might be made responsible for the destruction of a steamer from the bursting of a boiler, into which his imperfect material, after passing through many hands and various transformations, had been converted. To avoid such absurd conse-

quences, the right of suit for such a cause has been circumscribed within the bounds already defined."

To the same effect is the case of *Hulley v. Moosbrugger*, 88 N. J. L. 161 (1915), in which Chancellor Walker said at page 168:

"It is true that negligence is either the omission to do something which a reasonable man, guided by circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. (Bouv. Law Dict. Rawle's rev.) 748), yet, when negligence arises out of an act of commission by one for whose conduct another is responsible, it must be with reference to some duty which the responsible person owed *to the party injured*."

In applying this test to the facts set forth in the complaint, we find that the defendant's truck had passed the plaintiff before anything happened. It seems clear that from the fact that the defendant's truck was ahead of the plaintiff's car, and was evidently continuing to draw farther away from it all the time, the defendant's chauffeur could not foresee any injury to the plaintiff arising out of fast or careless driving. Certainly, after the defendant's truck had passed the plaintiff's car, the plaintiff was out of any foreseeable danger zone so far as the defendant's driving was concerned. In fact, there is nothing in the complaint to indicate that after the defendant's chauffeur passed the plaintiff's car, he could foresee injury to anybody by the way in which he was driving. There is no proof that other cars or persons were on the highway at the time in this vicinity. But, regardless of whether such persons were or were not on the highway, the defendant could not foresee that the possibility or probability of skidding by the truck, would create any danger to the plaintiff, who was in another automobile some distance behind.

Consequently, this case comes flatly within the principle laid down by the Court of Appeals of New York in its recent decision in the case of *Palsgraf v. Long Island Railroad Co.*, 248 N. Y. 339; 162 N. E. 99, 59 A. L. R. 1253 (1928). The facts in that case are that the defendant's guard, while assisting a passenger to board a train, carelessly knocked a package from the passenger's arms. The guard was unaware of the contents of the package. It contained fire works, which, when they fell, exploded, and the concussion threw down some scales at the other end of the station platform, some distance away, and injured the plaintiff.

In the trial court a verdict was returned in favor of the plaintiff, upon which judgment was entered, and this judgment in turn was affirmed by the Appellate Division. The Court of Appeals held that the judgment should be reversed, and the complaint dismissed, because the defendant had not been guilty of negligence to the plaintiff.

Cardozo, C. J., in delivering the opinion of the Court, said in 59 A. L. R. at page 1255:

"The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. *Relatively to her it was not negligence at all.* Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.'"

He said further at page 1256:

"A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over

a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. \* \* \* \* The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

“The argument for the plaintiff is built upon the shifting meanings of such words as ‘wrong’ and ‘wrongful,’ and shares their instability. What the plaintiff must show is ‘a wrong’ to herself, i. e., a violation of her own right, and not merely a wrong to someone else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to anyone. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act, and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other

travelers only because the eye of vigilance perceives the risk of damages. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. *The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.* Seavey, *Negligence, Subjective or Objective*, 41 H. L. Rev. 6; *Boronkay v. Robinson & Carpenter*, 247 N. Y. 365, 160 N. E. 400."

Another decision which is somewhat more similar to the case at bar, on its actual facts, is *Saylor v. Parsons*, 122 Ia. 679; 98 N. W. 500 (1904).

In that case the Appellate Court affirmed a judgment for the defendant, which had been entered on a directed verdict for the defendant. The facts were that the defendant was engaged in undermining a brick wall. The plaintiff who had been doing some similar work on another wall, some distance away, noticed that the wall at which the defendant was working, appeared to be toppling over upon the defendant. The plaintiff, believing the defendant to be in imminent danger, rushed over and propped up the wall, enabling the defendant to escape, but the wall thereafter fell upon the plaintiff, causing serious injury. In holding that the facts failed to constitute actionable negligence, the Court said at page 681 of the Official Reporter:

"But negligence on the part of the defendant either toward the person rescued or the party making the rescue after the attempt has been begun is essential to a recovery in all cases. This was illustrated in *Evansville & Crawford R. Co. v. Hiatt*, 17 Ind. 102, where a son undertook to rescue his father from in front of a moving train on a bridge, and recovery was denied for that the employes of

the railroad company did not observe either in time to avoid a collision."

It also said at page 683 thereof:

"Undoubtedly Parsons owed the moral duty of protecting his own person from harm. But the love of life is regarded as a sufficient inducement to self-preservation, all that is deemed essential for the government of persons in matters affecting themselves alone. Where no one else is concerned, the individual may incur dangers and risks as he may choose, and in doing so he violates no legal duty. He cannot be guilty legally, though he may be morally, of neglecting himself. It matters not whether he (Parsons) was vice principal or fellow servant, as he (Parsons) voluntarily undertook on his own motion to undermine the wall. *This endangered no one's life but his own. If he was in peril, it was because he placed himself there. There was no negligence on the part of either defendant as to him, and for this reason there could have been none as to his rescuer.*"

This language is most pertinent, particularly in view of the facts, to the case at bar. Undoubtedly, by driving carelessly, the defendant's chauffeur may have violated a moral duty to protect himself, but certainly he did not violate any legal duty in driving carelessly along a road where he could not foresee that driving carelessly would in any way jeopardize the plaintiff's interests. As the defendant's chauffeur was unable to foresee any danger of injury to the plaintiff arising out of the way in which he was driving the truck, certainly the plaintiff cannot claim that the defendant has been guilty of any actionable negligence so far as the plaintiff is concerned.

(b) *The defendant's duty to exercise care does not protect the plaintiff against the hazard of the injury he received.*

As already pointed out, legal duties are created to protect the person to whom the duty is owed from the danger of injury. But it by no means follows that the rule creating the duty to the plaintiff protects the plaintiff from all injuries which may proximately flow from the violation of the duty. This principle is a familiar one in construing statutes. Frequently in such cases, the defendant has admittedly violated the statute, i. e., he has violated a legal duty, and such violation has proximately caused injury to the plaintiff who comes within the class protected by the statute. But, before the court can hold the defendant liable for this violation, it must deal with the further problem, which is a pure problem of law, i. e., does the admittedly violated duty protect the plaintiff against the hazard of the injury which he receives. This is not a question of legal causation. It is a question of determining the scope of the rule which the plaintiff invokes as a basis for recovery against the defendant.

Thus, in the case of *Corris v. Scott*, L. R. 9 *Exchequer* 125 (1874), the declaration set forth that the orders of the privy council, pursuant to power vested in them by statute, required the owners of vessels used to transport cattle, to erect substantial cattle pens on the decks of such vessels; that while this order was in force, the plaintiffs delivered certain cattle to the defendant, who owned a particular vessel; that the defendant started on the voyage with the said cattle, but failed to put up the pens "by reason whereof divers of the sheep were washed and swept away by the sea from off the said ship, and were drowned, and wholly lost to the plaintiffs." The defendant demurred to this declaration, and judgment was given for the defendant on the demurrer.

In that case it is clear that the defendant was admittedly guilty of violating a duty which he owed to the plaintiff. Undoubtedly, the violation of this duty, was the

legal cause of the sheep being washed overboard. There was no averment that the sheep had been washed overboard because of any unusual seas or storms, and the ordinary and usual activity of forces of nature are never held to break the chain of legal causation. But the plaintiff failed to recover, and the Court held, as a pure question of law, that he could not recover because the duty which had been created for his benefit, did not protect him against the hazard of loss of his sheep in this manner. It only protected him against damage to his sheep arising out of the spread of disease which the presence of the pens would have prevented.

Although the problem which is thus brought up is more clearly seen in cases involving violations of statutes, we submit that it is equally involved in every common law action charging an actionable breach of duty, and that in determining the limits and scope and extent of the rule, which requires the defendant to conform to a required standard of conduct, the Court is exercising one of its highest functions, and is fixing the limits of the common law principle which plaintiff invokes.

An example of this is seen in cases involving the extent of a defendant's liability to the plaintiff where original injuries, arising out of the defendant's admitted negligence to the plaintiff are aggravated by the plaintiff's failure to secure medical treatment.

See *Duncan v. Nicholson*, 118 *Okla.* 275; 247 *Pac.* 979 (1926).

In such a case there is no doubt as to the defendant's negligence; nor can there be any question that the chain of legal causation has been broken by any new intervening force, although Courts have sometimes attempted to work the problem out in terms of causation. The defendant's

negligence has been the sole *active* cause, and is clearly a substantial factor in producing all of the injuries which finally result. This substantial factor test appears to be the generally accepted test of causation, at least in cases where no intervening active force comes into the picture. (Jeremiah Smith "Legal Cause in Actions of Tort"; Selected Essays on the Law of Torts 649, 711; Green, Rationale of Proximate Cause, 1927; Bohlen's Studies in the Law of Torts, Page 1).

This problem of the extent of the protection which is accorded to the plaintiff by the rule which he invokes, has been recognized by this Court.

In *New York, etc. Railroad Co. v. Ball*, 53 N. J. L. 283 (1891), the plaintiff was a passenger on the defendant's train, and was riding in the baggage compartment at the time when the train of another railroad collided with the defendant's train, and injured the plaintiff. In asking for a reversal of the judgment in favor of the plaintiff, the defendant contended that the jury should have been permitted to pass upon the question of the plaintiff's contributory negligence in riding in the baggage car. This Court, in an opinion by Judge Magie, said at page 287:

"In the charge to the jury, the trial judge stated the law on this subject thus: 'If a passenger, taking his place in a baggage car, even with the consent of those in charge, is injured by reason of anything likely to happen by reason of the construction or of the use of the baggage car for its appropriate purpose, he must abide the consequences.' But he limited the effect of such negligence in discharging the carrier from liability to the injuries mentioned, viz., those received from causes springing from the peculiar arrangement and use of such car as a baggage car, for he added that the rule above stated did not apply to the case in hand, because the plaintiff, under the circumstances dis-

closed by the evidence, could not be deemed to have negligently contributed to an injury received from extraneous causes.

“These instructions took from the jury the consideration of plaintiff’s negligence as contributing to his injury, and the verdict rendered thereon can only be supported if, upon such construction of the evidence as is most favorable to defendant’s contention, it was so established thereby that plaintiff’s act in riding in the baggage compartment was not negligent or did not contribute to his injury, as to justify an instruction to that effect.”

The Court then went on to say at page 290:

“Had plaintiff’s injuries been received from the fall of trunks negligently placed, from being struck by trunks negligently thrown in loading or unloading, or from other causes incident to the use of that compartment as a place for the carriage of baggage, it is obvious that his act in taking a place exposed to such risks would not meet the requirements of the law, for any reasonable man would conclude that such dangers were incident to that position, and prudence would require him to foresee and avoid them. Neglect in that respect would deprive him of any right to enforce liability on defendant for its negligence producing injury from such causes.

“But as to dangers from causes ab extra, I entertain no doubt that the law does not require any consideration of them under such circumstances. \* \* \* \* \* As to dangers, the circumstances called for and required no judgment, and a prudent man might well act without the least reference to them. *As to injuries received from such dangers, his conduct could not be deemed to be negligent, and a verdict finding negligence therein could not be sustained.*”

The decision in that case raises the problem squarely. The defendant there sought to invoke the rule which requires a plaintiff to measure up to a certain standard of conduct in order to avoid the charge of contributory negligence. It may very well be that for a passenger to ride in a baggage car, is, under some circumstances, at least evidence of contributory negligence. But the Court clearly recognized that the rule which required the plaintiff to exercise a certain standard of care, which may have involved keeping out of the baggage car, was not designed to protect the plaintiff (or we may say exculpate the defendant) from the hazard of injuries arising out of a collision with another train.

In all of these cases, the true problem before the Court is not one of causation, but is one of determining, to take a particular example, whether the rule of law which required the defendant to drive carefully in order to avoid injuring the plaintiff, was intended to protect the plaintiff against the hazard of injuries aggravated by plaintiff's failure to procure medical treatment.

So, in the case at bar, we submit, the problem is raised, quite apart from that of causation (which we will discuss hereafter), as to whether the duty which required the defendant to observe a certain standard of conduct in order to protect plaintiff's safety (assuming that such a duty existed and was breached), was intended to protect the plaintiff against the hazard of electric burns received in going to the assistance of the defendant's chauffeur. We submit further that such question should be determined in the negative. The duty to exercise care, we believe, is created for the purpose of protecting persons lawfully on the highway from dangers which are foreseeable from careless driving. But, in the case at bar, there is nothing to show that the collision with the pole endangered anyone on the highway.

We therefore submit that there was no actionable negligence in this case for two reasons: (1) The defendant could not foresee any danger of injury to the plaintiff from his actions, and (2) The rule of law which the defendant invokes for the purpose of recovering damages from the plaintiff does not protect him against the hazard of the injury which he received.

POINT 2.

The second point raised by the appellant is based upon the refusal of the Supreme Court to grant motion for a non-suit, for the cause that the proofs of the Plaintiff failed to show that the defendant was guilty of actionable negligence toward the Plaintiff. (S. C. 164 l. 8-13.) (S. C. 109 l. 16.)

ARGUMENT

The argument on this point has been covered under Point 1.

POINT 3.

The third point raised by the Appellant is based on the refusal of the Supreme Court to direct a verdict for the defendant for the cause that the whole record fails to disclose that the defendant was guilty of actionable negligence. (S. C. 165 l. 24-30.) (S. C. 149 l. 20.)

ARGUMENT

The argument on this point has been covered under Point 1.

POINT 4.

The fourth point raised by the appellant is based on

the failure of the Supreme Court to strike the complaint, on the ground that the complaint showed that the plaintiff voluntarily assumed the risk which resulted in his injury. (S. C. 164 l. 35.) (S. C. 13 l. 20.)

#### ARGUMENT

2. *The plaintiff's own voluntary action precludes him from maintaining this suit.*

(a) *The plaintiff voluntarily assumed the risk.*

Defendant's truck skidded off the highway, struck and knocked down a pole carrying wires, the truck overturning. Plaintiff was then 250 or 300 yards in rear. Plaintiff proceeded to a point within 50 feet of the accident, stopped his car, and hurried to scene of accident, and started to help Defendant's servant out of overturned car. (S. C. 20.) At this time, he was apparently crawling out from the wreck. (S. C. 83). The wire was suspended from the pole, but it is not known whether it was on the truck or not. (S. C. 93 l. 12.) Plaintiff came in contact with this wire, and was injured.

The plaintiff avers that, at the time, he believed the defendant's chauffeur had been seriously or fatally injured, and was in peril, and that he went to the chauffeur's assistance. Certainly, the wires were in plain view of the plaintiff at that time. Under such circumstances, the plaintiff voluntarily assumed the risk of receiving a shock from them. Where the plaintiff perceives the danger and comprehends the risk, and there is no breach of duty by the defendant, the situation falls within the legal maxim *volenti non fit injuria*.

In the leading case of *Thomas v. Quartermaine*, 18 Q. B. D. 685 (1887), the facts were that the plaintiff, who

had been employed on the defendant's premises for some time, fell into a large open vat containing scalding liquids. In holding that plaintiff could not recover, Bowen, L. J. in his opinion in the Court of Appeal, said at page 697:

“\* \* \* \*The doctrine of volenti non fit injuria stands outside the defense of contributory negligence and is in no way limited by it.”

In *Goetz v. Hydraulic Pressed Brick Co.* 9 S. W. 2d Ser. 606; 60 A. L. R. 1064 (*Missouri* 1928), the court held, reversing a judgment in favor of the plaintiff, that where the plaintiff who was present with the permission of the defendant, voluntarily stood by a blacksmith's shop on the defendant's premises, knowing that sticks of dynamite were contained in a box, which was in proximity to red hot metal, and was thereafter injured by an explosion of the dynamite, there was no liability on the part of the defendant, and that the plaintiff had assumed the risk of the injury.

#### POINT 5.

The fifth point of the appellant is based on the refusal of the Supreme Court to non-suit the Plaintiff for the cause that the Plaintiff's proofs showed that Plaintiff had voluntarily assumed the risk which resulted in his injury. (S. C. 165 l. 17.) (S. C. 109 l. 16.)

#### ARGUMENT

This Point has been argued under Point 4.

#### POINT 6.

The sixth point raised by the appellant is based on the refusal of the Supreme Court to grant the defendant's

motion to strike the complaint on the ground that the complaint failed to show that the defendant's conduct was the legal cause of Plaintiff's injury. (S. C. 165 l. 3.) (S. C. 13 l. 20.)

#### ARGUMENT.

3. *The defendant's conduct was not the legal cause of plaintiff's injury.*

(a) *The defendant's initial negligence did not cause any injury.*

The plaintiff may argue that the defendant was negligent to the plaintiff at the moment the defendant's chauffeur drove past the plaintiff's automobile, in that, at that time the defendant's conduct created an unreasonable danger of injury to the plaintiff, because of the danger of skidding into the plaintiff's automobile in passing, and that the plaintiff is entitled to rest his cause of action upon this initial negligence.

But, if this contention is sound, where is liability going to stop? If the defendant, because of the manner in which he drove past the plaintiff, is still actively negligent as to the plaintiff when he is twenty-five or fifty or one hundred yards ahead of the plaintiff, at what point does such conduct cease to be actively negligent so far as the plaintiff is concerned? Suppose, for example, that when the defendant's chauffeur had lengthened the distance between the two cars to three hundred yards, at which point the defendant's truck reached a bridge, the truck skidded off the side of this bridge into the stream below, pinning the chauffeur under the truck in the water. Suppose, also, that when the plaintiff arrived upon the scene a minute or two later, he saw what had happened, and fearing that the chauffeur was in danger of drowning, went to his rescue, and was himself drowned.

It would seem absolutely clear that any initial negligence on the part of the defendant in driving past the plaintiff's car, at an improper rate of speed, some one-quarter of a mile down the road from the scene of the accident, could in nowise be deemed the active negligence which led to the drowning of the plaintiff. Yet, the act of the chauffeur in driving past the plaintiff's car is most certainly the only conduct which the plaintiff can point to as being in the slightest way negligent as to the plaintiff.

Or, suppose, that in the case at bar, the defendant's truck, after passing the plaintiff's car, continued on down the road for another mile, and then skidded into the pole with exactly the same results as alleged in the complaint. Suppose that at the time of this skidding the plaintiff's car was half a mile behind the truck, and arrived upon the scene of the accident a few minutes later, whereupon as here, the plaintiff went to the assistance of the chauffeur. In such case we do not see how anybody could possibly contend that the defendant had been negligent to the plaintiff, or that any negligence of the defendant to the plaintiff had been the cause of the plaintiff's injury. Certainly, the plaintiff, in either one of the hypothetical cases, just given, could not go back to the fact that at some earlier time the defendant had driven carelessly past the plaintiff, and although no injury had resulted, tack a cause of action onto that initial conduct of the defendant.

We cannot see where the facts here are any different from either of the hypothetical cases given above. After the defendant's chauffeur had passed the plaintiff's automobile, he could not foresee any probable danger to the plaintiff arising out of the driving, whether the cars were ten yards apart or half a mile apart. All that the chauffeur could reasonably foresee would be that his driving created a danger of skidding off to one side of the road. It would be most improbable to say that such skidding

could in any way affect the plaintiff, who is behind the defendant's automobile, and who presumably is driving in a careful and prudent manner, and has his car under such control that he can bring it to a stop within a reasonable distance.

The facts are akin to the situation which arose in the Pennsylvania case of *Boulfrois v. United Traction Co.*, 210 Pa. 263 (1904). In that case, the plaintiff, who was boarding a trolley car, was thrown from the running board of the car by a sudden jerk of the car, and was seriously injured. There was a dispute as to whether the trolley car had actually stopped to permit the plaintiff to get on, and also as to whether the plaintiff had actually succeeded in getting on the running board before the jerk of the car took place.

In Pennsylvania, it is contributory negligence per se to attempt to board a moving trolley car. Because the Trial Judge had improperly charged the jury on this point, the case was sent back for a new trial. But while the Supreme Court distinctly recognized the doctrine that an attempt to board a moving car is contributory negligence, as a matter of law, it said at page 265:

"Was the act of getting on complete, when the jerk threw him off, if it did throw him off? If it was complete then the company's negligence caused the accident, just as clearly as if some other passenger, on his feet looking for a seat, was thrown violently to the floor or thrown off by a sudden jerk of the car by a reckless conductor."

The Court said further at page 265:

"If (the car) either had, or had not stopped and he was safely on, then if the conductor, by suddenly and recklessly turning on the power gave the car a jerk which threw the boy off, it was the conductor's negligence that caused the injury and he can recover."

The Pennsylvania Court was flatly of the opinion that even though at an immediately prior time the plaintiff had been contributorily negligent, the defendant could not go back to that prior contributory negligence in order to defeat the plaintiff's action.

So, also, in the case at bar, we contend that the plaintiff cannot go back to any prior conduct of the defendant's chauffeur, and point to it as a basis for recovery.

In support of this view, the law is stated as follows in 42 C. J. 959:

"Negligence in connection with the passing of automobiles is immaterial in fixing liability for an accident which occurred after the passing, and was not connected therewith."

Upon this point, we desire to refer to the decision in *McDonald v. Collins*, 144 Miss. 820, 110 Southern 663 (1926). In that case the plaintiff and his son were riding along the highway on horseback. Some fifteen feet behind them was the plaintiff's dog. The defendant, traveling in the opposite direction, in an automobile, passed the plaintiff at a rate of speed which was illegal in passing persons on horseback, and thereafter ran into and killed the plaintiff's dog. The plaintiff argued that he could connect up the initial negligence in driving past him at an illegal rate of speed with the death of the dog, and thus make out a cause of action. The Court held, as a matter of law, that the plaintiff could not recover. In its opinion, the Court said at page 824 of the Official Reports (110 So. 664):

"It does not appear from this record that the untimely death of the dog was caused by the rapid rate of speed at which the defendant travelled past the horses ridden by

the plaintiff and his son. There is no connection shown between the dog's death and the driving of the automobile propelled by gasoline at a greater rate of speed than eight miles an hour while passing the horses."

The Court said further at page 825 (110 So. 664):

"Driving the automobile rapidly past the horses and horsemen cannot be said to be the proximate cause of the injury to the dog."

In *Berridge v. Pray*, 202 Ia. 663, 210 N. W. 916 (1926), the facts were that the plaintiff attempted to pass the defendant's car, and succeeded in doing so. There after, the defendant caught up with the plaintiff's car, colliding with it. At the trial, the trial court submitted three grounds of negligence to the jury. Two of these were:

"(1) That the defendant failed to turn to the right, to permit plaintiff's car to pass, after a signal that plaintiff desired to pass; (3) that defendant was negligent, after being so signalled, in accelerating the speed of his car for the purpose of preventing the plaintiff from passing."

The Appellate Court held that submitting these facts to the jury was reversible error. The Court said at page 665 of the Official Reporter (210 N. W. 917):

"Any attempt by appellant to prevent the appellee from passing, either by refusing to turn out, to let him pass, or by speeding up his car to prevent his passing, *no matter how negligent such conduct might have been*, could, in the very nature of things, have had no causal connection with a collision occurring after appellee had so passed in safety, and was ahead and in the clear of appellant's car."

So, also, in the case at bar, any negligence of the defendant in passing the plaintiff's car, could have had no causal connection with an injury to the plaintiff suffered after the defendant's truck had safely passed the plaintiff's car, and was pulling ahead of it down the road.

(b) *The plaintiff's voluntary intervening act is a novus actus interveniens, which relieves the defendant of any liability for the plaintiff's injuries.*

There cannot be the slightest doubt in this case that the skidding of the truck did not put the plaintiff in any danger. When the truck skidded, it was ahead of the plaintiff. Certainly, whatever original act of misconduct there may have been by the defendant's chauffeur, had come to rest before any injury to the plaintiff happened, the active force of the skidding of the truck spent itself harmlessly. After it had come to rest, a new force appeared upon the stage, in the shape of the voluntary conscious action of a reasoning human being, the plaintiff.

We submit that this new active intervening force was the legal cause of the plaintiff's injuries, and that the defendant cannot be held liable for the mere condition which it created, and which was not dangerous to the plaintiff, or to any other traveller upon the highway.

It is true that the subject of legal causation is a troublesome one. But, although a careful study of the cases in this country reveals many inconsistent statements in the language of the courts, we submit that the actual deci-

sions, with occasional exceptions, show two very distinct tendencies:

1. Where there is no new force which comes into operation after the defendant's conduct has commenced to operate, and where the defendant is negligent as to the particular plaintiff, then the defendant is liable for all damages to the plaintiff, which follow in an unbroken chain of cause and effect from the defendant's negligence, regardless of how improbable or unusual such damages may be.

2. Where some new force comes upon the scene after the defendant's negligently released force has started to operate, and joins with the defendant's force to produce an injury, which otherwise would not have occurred, the defendant is not liable for this injury, unless at the time of his initial negligent act he should have reasonably foreseen that it was probable that the intervening force would come upon the scene. (See Throckmorton's *Cooley on Torts* (1930), pages 57 to 64).

In 2 *Blashfield's Cyc. of Automobile Law* 1196 (1927) the author says:

"An intervening efficient cause is a new and independent force, which breaks the causal connection between the original wrong and the injury, and an act of negligence that results in an injury that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate cause of the injury."

The only conduct of the defendant which can possibly be deemed negligent as to the plaintiff was the act of driving past the plaintiff's automobile in the manner alleged in the complaint. *We submit, that at that moment, the defendant should not be required to foresee the intervening force which later came into play.*

In *Saylor v. Parsons* 122 *Ia.* 679; 98 *N. W.* 500 (1904), the Court said at page 684 of the Official Reports:

"Nor is the probability of receiving such assistance a matter which a person of ordinary diligence, in undertaking a perilous enterprise, would be likely to take into consideration. Men do not expose their lives to danger with the idea that others will protect them from harm by risking their own lives. Though history teems with accounts of heroic conduct and self-sacrifice, deeds of this kind have not become so common that they are to be anticipated as likely to occur whenever opportunity is afforded. The instincts of self-preservation still so dominate human conduct that acts like that under consideration, in which life itself was risked for the protection of another, are of such rare occurrence as always to commend the special attention and admiration of the entire community, and by the common voice of mankind those who do them are singled out as worthy of enrollment on the scroll of heroes. Because of this infrequency, however, it cannot be said that they should enter into the calculations of men as at all likely in the ordinary transactions of life. As they spring from magnanimity, magnanimity must be relied upon in cases like this for reparation."

In dealing with the question of legal causation, this court, speaking by Mr. Justice Minturn, has said in *Powers v. Standard Oil Co.*, 98 *N. J. L.* 730, 734 (1923):

"A comprehensive definition of the term 'proximate' is not without its practical difficulties, and an attempt at definition has led to complexities; but the rule finds apt expression in the observation of the Supreme Court of Maine, in *Moulton v. Sanford*, 51 Me. 134: 'Ordinarily, that condition is usually termed the cause, whose share in the matter *is most conspicuous, and is immediately preceding and proximate to the event.*' (Italics by the Court)

"The determination of the question, says one eminent commentator, is to be based 'upon mixed considerations of logic, common sense, justice, policy and precedent.' 1. *Story Leg. Liab.* 110."

We also call attention to the decision of this Court in the case of *Migliaccio v. Public Service Railway Co.*, 101 *N. J. L.* 496 (1925), which was an action for damages upon the death of the plaintiff intestate as a result of the defendant's negligence. The decedent had been injured in an automobile collision with the defendant's bus. Fifteen months later, he died of pulmonary tuberculosis. The plaintiff produced expert testimony to prove that the accident lowered the deceased's vitality, making the deceased susceptible to contracting the tuberculosis. This Court there held that the Trial Court erred in refusing to grant a nonsuit. In an opinion written by Mr. Justice Katzenbach, this Court said (page 498):

"The question of proximate cause in negligence cases presents as delicate a question as exists in the law. It is difficult to lay down any general rules which will act as a guide in all cases, as much depends upon the facts of the individual cases. \* \* \* \* *But it is as necessary for the plaintiff to establish the fact that the injury is one which might have been reasonably anticipated by the wrong-doer as it is to show that there was no other intervening cause*

*efficient in itself to work the injury complained of. Anticipation is an essential element of proximate cause.*

“Of the text writers, Cooley, in his work on Torts (third edition, page 73), best expounds the principle. He uses the following language taken from *Add. Torts*: ‘If the wrong and the resulting damage are not known by common experience to be natural and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.’

“In the case of *Cole v. German Savings and Loan Assoc.*, 124 Fed. Rep. 113. Circuit Judge Sanborn defined a probable cause as one that is more likely to follow its supposed cause than it is to fail to follow it.”

In practically all of the decisions, both in New Jersey and elsewhere, in which contrary language appears, a study of the cases discloses that the Court was dealing with the situation in which no true intervening force had come into action. But, there can be no doubt, that the conscious voluntary action of the plaintiff in this case, is a true intervening force in the fullest meaning of that term.

Therefore, we submit, that upon the facts disclosed by the complaint, the defendant's conduct, as a matter of law, cannot be deemed to be the legal cause of the electrical shock which the plaintiff received when he went to the assistance of the defendant's chauffeur, and ran into a wire heavily charged with electricity, which wire, from all that appears in the complaint, was not located in any place where it was necessary for the plaintiff to encounter it in order to assist the chauffeur.

## POINT 7.

The seventh point raised by the appellant is based upon the Supreme Court's refusal to non-suit the Plaintiff on the ground that the Plaintiff's proofs failed to show that the defendant's conduct was the legal cause of the Plaintiff's injury. (S. C. 165 ll. 20.) (S. C. 109 l. 20.)

## ARGUMENT

This point has been argued under Point 6.

## POINT 8.

The eighth point raised by the appellant is that the learned Court erred in charging the jury as follows:

"Every person operating a motor vehicle who shall knowingly be involved in an accident shall at once stop and ascertain the extent of the injury and render such assistance as may be needed." (S. C. 166 l 8; S. C. 157 l. 27)

## ARGUMENT

True that the Court explained that this statute would not excuse the lack of ordinary care (S. C. 157 l. 30) But this was insufficient to cure a false impression made upon the minds of the jury.

It must be clear that the legislature did not intend to impose upon every observer of an accident a statutory duty to stop, inquire, and assist. If so, a thousand motorists on one of our busy highways, having observed that an accident had occurred on the road, would all be obliged to obey this command. This brings us to an absurd situation. By the use of the word "involved" the legislature clearly intended to impose a command upon one who was "wrapped up", in, or implicated in; in some way, an actor or participant in, an accident.

By the charge made in this case, even with the explanation as to the continued need of ordinary care, there must have been left in the minds of the jury the conviction that the plaintiff, in stopping his car, and commencing his alleged assistance, was doing what he was obliged to do by law. Assuming this as a false premise, they were doubtless willing to excuse a lack of care in one performing a legal duty in which he had no choice; a pardon which may not have been granted to a mere volunteer.

The actions of the Plaintiff at this point in the case were crucial, and those actions alone led to his injury. At this crucial point, the Court's charge put the Plaintiff in a position more favorable than the position to which he was entitled in law—and was seriously prejudicial to the defendant's case.

#### POINT 9.

The appellant's ninth point relates to the fifth ground of appeal (S. C. 166 l. 13), and complains of the Court's charge to the jury as follows:

“Every person having occasion to use the public highways of the State is entitled to feel that he is absolutely safe, while using ordinary care, and if one renders its ordinary use dangerous he is legally answerable for injuries directly resulting therefrom to a lawful user of such highway.” (S. C. 158 l. 10).

#### ARGUMENT

This is palpably a clear and direct mis-statement of the law, as applied to the case at bar, and just as clearly, is seriously harmful to the defendant.

This charge throws overboard the whole body of negligence law, by which liability follows negligence, or the failure to perform some legal duty, and casts a net of legal

liability over everyone who happens to render the ordinary use of the highway unsafe, no matter how. It fastens a penalty upon the physician, the policeman, the ambulance, the fire truck, hastening to avert catastrophe, but with due care under the circumstances; it covers the cautious driver who is stricken with a physical malady whereby he loses control of his car; it attacks the careful motorist, driving with due care, who skids in a crowded highway, or loses control of his car by reason of latent mechanical defect; in short, in line with the whole theory of the plaintiff's case at bar, it extends liability in all directions, and to a hitherto undreamed of extent.

On a proposition so fundamental, it seems scarcely necessary to cite decisions. But the early case of *Marshall v. Welwood et al* (38 N. J. Law 339) is noteworthy for the interesting analysis made by Chief Justice Beasley. The Court held that the owner of a steam boiler was not responsible for damages resulting from its explosion in the absence of negligence, and repudiated the doctrine of the leading English case of *Fletcher vs. Rylands*. (L. R. 1 Exch. 265)

The learned Court said:

"I cannot agree that, from these indications, the broad doctrine is to be drawn that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. . . . The common rule, quite institutional in its character, is that, in order to sustain an action for tort, the damage complained of must have come from a wrongful act. Mr. Addison, in his work on Torts, Vol. 1, p 3, very correctly states this rule. He says: 'A man may, however, sustain grievous damage at the hands of another, and yet, if it be the result of an inevitable accident, or a lawful act done in a lawful manner, without any carelessness or negli-

gence, there is no legal injury, and no tort giving rise to an action for damages.”

This case was followed by the Supreme Court in *Beale v. McAllister Coal Co.*, (82 N. J. Law 151), in an opinion by Mr. Chief Justice Gummere, and has been followed in a long line of cases down to 1923.

What a user of the highway *has* got a right to expect, has been expressed by this court as the right to assume that the other driver would exercise reasonable care equally with himself. . . .”

*German v. Harris* (106 N. J. Law 521)

It may be argued that elsewhere in the charge, the learned Judge properly charged the law of negligence. This cannot cure the incorrect charge referred to. It came at the end of the charge, in response to a request by the plaintiff, and unquestionably gave to the jury, by direct expression, the conviction that if the use of the highway by the plaintiff was made unsafe by the defendant, the defendant was liable.

Defendant respectfully, but most earnestly insists that this charge was a fundamental, important, incurable, and seriously prejudicial error.

So serious a mis-statement do we regard the error, that we believe it was charged by the learned Judge inadvertently, but the expression went to the jury, and left them no choice as to a verdict.

#### POINT 10.

The appellant's tenth point relates to the seventh ground of appeal (S. C. 166-l. 31), to the refusal of the

Supreme Court to charge a request of the defendant as follows:

“If you find that the defendant’s truck at the time it passed the plaintiff was under proper control and did not get out of control until it was completely passed the plaintiff, and some distance ahead of him, your verdict should be for the defendant.” (S. C. 162 11)

#### ARGUMENT

This relates to the question of whether or not the facts in the case at bar show actionable negligence, and was argued under Point 1.

#### POINT 11.

The appellant’s eleventh point relates to the ninth ground of appeal, in which the court refused to charge:

“If you believe that the manner in which defendant’s truck was driven past the plaintiff’s car was not a substantial or material factor in causing the injuries the plaintiff received, your verdict should be for the plaintiff. (S. C. 167 l. 10.)

#### ARGUMENT

This has been largely argued under Point 6.

The following contention, however, is further respectfully urged:

If there was any negligence at all on the part of the defendant, it could have been only at the time his truck was driven past plaintiff’s car. It follows that if this sole negligence was not a “substantial or material factor” in causing the injuries, the defendant is not liable.

“Negligence in connection with the passing of automobiles is immaterial in fixing liability for an accident

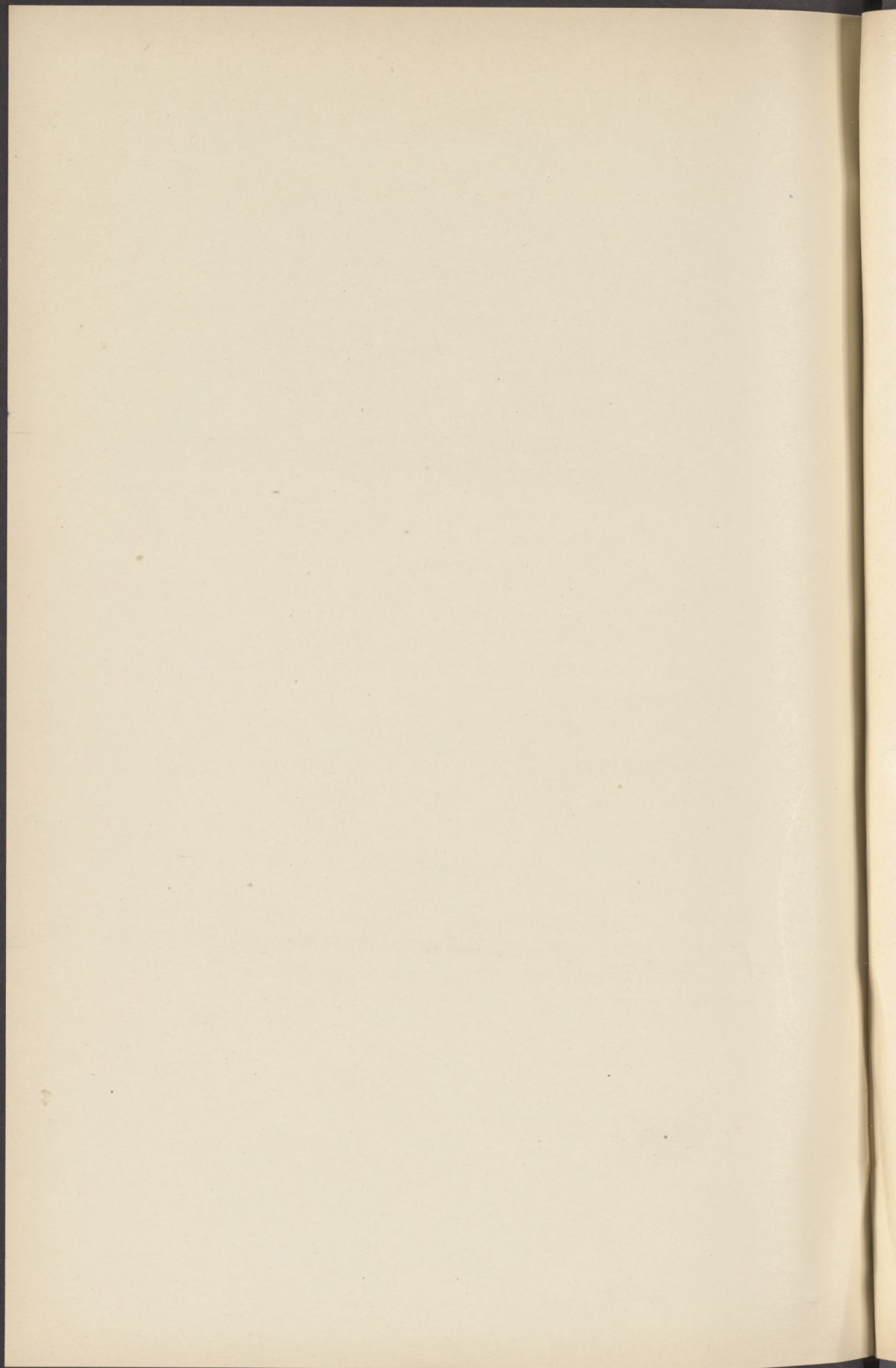
which occurred after the passing, and was not connected therewith. (42 C. J. 959.)

CONCLUSION.

In conclusion, defendant respectfully submits that by reason of the substantial and prejudicial errors of law referred to in the previous points, the judgment of the learned court below, awarding judgment to the plaintiff, should be reversed.

Respectfully submitted,

T. MILLET HAND,  
*Attorney for and of Counsel  
with Defendant-Appellee.*



NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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BENJAMIN F. BUTLER,  
*Plaintiff-Appellee,*

v.

JERSEY COAST NEWS Co., a corporation of  
the State of New Jersey,  
*Defendant-Appellant.*

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ACTION AT LAW.

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ON APPEAL FROM THE NEW JERSEY SUPREME COURT.

---

BRIEF FOR PLAINTIFF-APPELLEE.

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STATEMENT.

This is a negligence case. The combination of happenings resulting in plaintiff's terrible injuries was unusual; the applicable propositions of law are fundamental.

Plaintiff's automobile was being slowly and carefully driven over the ice-encrusted concrete highway between Laurelton and Point Pleasant. At a speed of fifty miles per hour or better, defendant's truck overtook, and at that speed was attempted to be driven around it. A skid on the glazed surface inevitably resulted.

Defendant's car crashed against an electric light pole carrying heavily charged cables, wrecking it. The car overturned; the pole fell upon it; the wires with their lethal load, weighted down by the fallen pole, hung low over the concrete of the public highway. Negligence chargeable to defendant had created an obstruction to continued lawful use of the highway and a trap—a menace to life.

The trap was baited. Defendant's agent had been caught beneath the wrecked pole and truck. It was inconceivable that he had not been seriously injured and was not in dire need of immediate succor. Plaintiff hurried to the rescue, his eyes and mind upon the imperiled man. He walked upon the concrete of the public highway. He leaned over to aid the man under the wreckage. His head came into contact with a cable, low-hanging over the highway. There was a flash. He fell unconscious; his body was still upon the public highway.

Plaintiff's automobile was a factor in the skid, first link in the chain of circumstances resulting in his injury. As a participant in the happening he was charged by law to halt and give aid. He might presume the highway and right of way to be a safe place in which to be and to act. He was injured while on the public highway acting as the law directed and love of humanity prompted.

TESTIMONY.

The facts were for the jury and justified the verdict:

THE CONCRETE WAS GLAZED WITH ICE:

“The evening was warm, but by morning it was very cold, and the dampness had frozen on the cement roads” (p. 16, l. 4).

“It was a slippery road most all the way. I drove very carefully, because I felt I had been warned twice to look out for an accident” (p. 17, l. 1).

“Well, right where he (defendant’s chauffeur) passed me (plaintiff) it was along a piece of woods, and it seems as though the wind was a westerly wind and it had knocked the dampness onto the cement” (p. 17, l. 20).

“It was glassy” (p. 17, l. 27).

PLAINTIFF WAS DRIVING SLOWLY AND CAREFULLY:

“I drove very carefully, because I felt I had been warned twice to look out for an accident” (p. 17, l. 1).

Plaintiff was driving

“not over 20 or 25 miles an hour” (p. 17, l. 29).

“In the middle of the right side of the road”  
(p. 17, l. 31).

The witness, Miller, said plaintiff's car was traveling

“somewheres about the middle of it. Perhaps a little to the right of the center of the road. I will say about the middle of the road” (p. 81, l. 5).

“We weren't going fast, because the machine had been slipping and swinging. The back end sometimes seemed to want to go ahead, and Butler was driving very carefully on that account” (p. 81, l. 11).

DEFENDANT'S CHAUFFEUR OVERTOOK  
PLAINTIFF'S CAR AND ATTEMPTED TO  
PASS IT AT A HIGH RATE OF SPEED ON THE  
ICY HIGHWAY:

“Did you know that this other car was back of you until it came up abreast of you?

A. Didn't know it until I saw him.

Q. Did you have any warning?

A. None whatever.

Q. No horn or anything of that kind?

A. No, sir.

Q. Were there any cars coming towards you at the time?

A. No, sir” (p. 17, l. 32).

Mr. Miller said:

“I couldn't say as to the speed of it, but it

went by us pretty fast. I should judge it was going, perhaps, two foot to our one" (p. 81, l. 17).

INEVITABLY DEFENDANT'S TRUCK  
SKIDDED:

"After he pulled out around me and undertook to come up in front of me again, he seemed to lose control of his car \* \* \*. It was all over the road like that. He couldn't steady it" (p. 18, l. 11).

"I should judge he wasn't going less than 50 or 60 miles an hour" (p. 18, l. 17).

"Well, when he went by us he was hauled in again more in the center of the road, or tried to, and the machine got to zigzagging backward and forward across. He was apparently trying to get it under control, but there was ice and everything slippery and it took him quite a while before he could get straightened up" (p. 81, l. 25).

DEFENDANT'S CAR BROUGHT DOWN THE  
ELECTRIC POLE AND WIRE AND OVER-  
TURNED BENEATH IT:

Defendant's truck skidded a considerable distance, estimated by witnesses at from 150 feet (p. 81, l. 33) to five or six hundred yards (p. 18, l. 26). The car left the concrete and struck the pole "at least ten or fifteen feet" off to the right (p. 18, l. 33).

“It came right out and turned right back into the road again, across the road” (p. 19, l. 1).

“His car laid deliberately across to the right-hand side of the road” (p. 19, l. 20).

Defendant's

“machine turned to the eastward and went into the bank, struck the pole, turned out, struck the pole and rolled over on its side, and the pole fell down partly on top of it” (p. 81, l. 34).

DEFENDANT'S WRECKED CAR CAME TO REST ON THE RIGHT OF WAY OF THE STATE HIGHWAY, PARTLY UPON THE CONCRETE AND PARTLY UPON THE GRAVEL; THE ELECTRIC WIRES WERE PULLED DOWN OVER THE CONCRETE AND THE GRAVEL SHOULDER:

Defendant's truck was

“partially onto the concrete road. I don't just know whether the back wheels was on the concrete or not. The front wheels was, and the pole was down partly over it, not directly in line with the machine, but at a little angle” (p. 83, l. 1).

“Across to the right-hand side of the road. The machine” (p. 19, l. 4).

“After Mr. Butler fell I happened to glance and I saw this wire leading from the poles on either side, and it came to me right away what was the matter with him” (p. 83, l. 36).

“Well, it was down within—what would have been the upper end of the pole was down within three or four feet of the concrete road.

Q. And over the concrete road?

A. Over the concrete road.

Q. Were the wires still fast to the top of that pole where it was over the concrete road?

A. They were.

Q. How close did that bring them to the machine where it was overturned?

A. Why, it was partially lying on the machine, as I remember it. It laid pretty near lengthways of the machine. It had a little angle to it.

Q. Had the base of the pole, as you saw it after Mr. Butler had been hurt, been broken completely through?

A. Oh, yes, it was broken clear off.

Q. The wires themselves hadn't given way, but were held down by the weight of the pole?

A. No, they hadn't broken. The wires were all right. They weren't broken. They were held up from going clear on down onto the concrete” (p. 84, l. 5).

WHEN SHOCKED AND BURNED THE  
PLAINTIFF STOOD UPON THE CONCRETE  
OF THE PUBLIC HIGHWAY; THE ELECTRIC  
WIRES HUNG LOW OVER THE CONCRETE  
AND GRAVEL SHOULDER:

“Where you went and reached down to get hold of the man, where were you, on what part of the highway or off the highway?

A. I hadn't stepped off the cement yet.

Q. You were still on the cement?

A. Yes, sir. The car went off and shot back to the cement, across it.

Q. So when you were reaching to help him, you were still on the cement yourself?

A. Yes, but I fell off the cement" (p. 21, l. 6).

"He (the plaintiff) got there and reached down, apparently to get hold of the man or to help him if he could.

Q. Then what happened to him?

A. Well, he straightened up and then bang, he got in contact with that wire, and that was the end of Mr. Butler" (p. 83, l. 17).

"Where he fell was partly on the concrete. Most of him was on the concrete, and I think his head and perhaps his shoulders was off on the gravel" (p. 83, l. 29).

NEGLIGENCE OF DEFENDANT'S CHAUFFEUR PRODUCED THE DANGEROUS CONDITION ON THE PUBLIC HIGHWAY; DEFENDANT'S SERVANT BENEATH THE WRECKAGE, IN APPARENTLY IMMINENT PERIL, URGED AND COMMANDED PLAINTIFF TO ATTEMPT A RESCUE AT THIS SUDDENLY CREATED POINT OF GREAT DANGER:

"We run up as fast as we could to him, got up there in probably 50 or 60 feet, stopped his machine and we got out" (p. 82, l. 8).

"Well, got out. I got out of the machine

ahead of Butler. I had to, because I was on the right-hand side and the steering gear was on the left, and I got out of the car on my right-hand side, and as I stepped out, I stepped on this ice and slipped. Butler got out by me then—he is a little quicker on his feet than I am, and I kind of caught myself by putting my hand on the car, and by the time I got straightened out he was quite a little ways ahead of me, and then we both hurried as fast as we could down to where the wreck was” (p. 82, l. 22).

“He was apparently crawling out from under the wreck, or trying to. It looked to me as though he was trying to get out from under the cab.

Q. When you both hurried over there, who got there first?

A. Mr. Butler did.

Q. What did he do or attempt to do?

A. He got there and reached down, apparently to get hold of the man or to help him, if he could.

Q. Then what happened to him?

A. Well, he straightened up and then bang, he got in contact with that wire, and that was the end of Mr. Butler” (p. 83, l. 10).

Plaintiff testified:

“When I got out of my car, he apparently was under his own car, jammed, trying to get out.

Q. Go on and tell us what you did.

A. Mr. Miller had to get out of my car first, being that he sat on the right-hand side, and

when he got out, he slipped, and as I stepped down I looked to see if he had gotten up, and I went immediately on over to this man and started to help him out of his car.

Q. What did you do to help him out?

A. I stooped over and tried to pull him out. I don't know any more after that than I do now.

Q. That is the last you know?

A. Yes, sir.

Q. You didn't actually feel the shock itself, or at least, you have no recollection of it now?

A. Never knowed what hit me at all.

Q. What is your very last recollection? What were you doing at the last recollection?

A. The last I can ever remember is when I stooped over like this to take hold of him, and I didn't do it, or else when I straightened up I was knocked out. I don't know which. The wire caught me right here on this side of my head. I was facing towards the rear of the car.

Q. What part of the car was he under? The rear of the car?

A. No, sir, he was under where the driver would sit, or opposite where the driver would sit on a car. There was no getting out of the car any other way, because it was loaded with paper" (p. 19, l. 32).

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#### BRIEF AND ARGUMENT.

Defendant-appellant presents eleven points. A number of these may be argued together.

Points 1 to 3, inclusive:

1. DEFENDANT'S CLAIM THAT IT WAS NOT GUILTY OF ACTIONABLE NEGLIGENCE.

Points 4 and 5:

2. DEFENDANT'S CLAIM THAT PLAINTIFF VOLUNTARILY ASSUMED THE RISK OF INJURY.

Points 6 and 7:

3. DEFENDANT'S CLAIM THAT ITS INITIAL NEGLIGENCE WAS NOT THE LEGAL CAUSE OF PLAINTIFF'S INJURY.

Point 8:

4. DEFENDANT'S CLAIM THAT THE COURT ERRED IN CHARGING THE JURY.

Point 9:

5. DEFENDANT'S CLAIM THAT THE COURT ERRED IN ITS CHARGE TO THE JURY.

Point 10:

6. REFUSAL OF THE TRIAL COURT TO CHARGE A REQUEST.

Point 11:

7. REFUSAL OF THE TRIAL COURT TO CHARGE A REQUEST.

## 1.

DEFENDANT'S CLAIM THAT IT WAS NOT GUILTY OF ACTIONABLE NEGLIGENCE BECAUSE ITS CHAUFFEUR COULD NOT FORESEE THAT HIS NEGLIGENT CONDUCT MIGHT INJURE THE PLAINTIFF.

(Points 1 to 3, inclusive.)

The negligence charged in the complaint and proven at the trial involved a chain of happenings, the first link of which was forged by defendant's chauffeur when he recklessly drove defendant's truck over a highway glazed with ice at a speed of from 50 to 60 miles an hour to and around plaintiff's slow-moving machine, without sounding horn or signal.

Defendant's chauffeur could and should have considered a skid inevitable if he pursued the course of conduct he determined upon. He was overtaking a car in the middle of the highway or just to the right of the middle line. Plaintiff's car was being driven slowly and carefully. The roadway was icy and treacherous. Defendant's chauffeur should have slackened speed, signalled for additional room and passed plaintiff's car in safety. He chose to ignore caution. He gave no signal. At a speed of fifty miles per hour, or better, on that icy road, he attempted to swing around plaintiff's car and try to again straighten out on the highway ahead. The to-be-expected skid occurred.

An automobile, out of control and skidding on an

icy highway, is only limited in its destructive force by its previous speed and the presence of obstructive objects. The speed of defendant's car, as the skid began, carried it, slipping and sliding off the concrete and to the gravel shoulder where it collided with one of a line of electric light poles beside the highway. A wreck, it hurtled around to fall again partly upon the concrete.

Electric light poles, carrying their cables, ran all along beside the highway. Obviously a series of poles, beside the right of way and parallel to the highway, constituted fixed objects likely to be encountered in a skid by an automobile, beginning at the rate of fifty or sixty miles an hour.

Defendant's chauffeur, playing with an almost certain crash, must be presumed to have known that he should not block the highway or create dangers therein for the public. Electric light poles were obstructions nearest to the concrete and the most likely objects to halt a machine forced into a skid at terrific speed. The skid was inevitable; the crash into the pole, the most likely consequence.

Use of the public highway had become dangerous through negligent conduct of defendant's chauffeur. The skid had occurred in attempting to pass plaintiff's automobile. If plaintiff's automobile had not been there, the change of course which caused the skid would not have been necessary. Plaintiff's car, consequently, was "involved" in this happening. Defendant's truck was wrecked on the highway just in front of plaintiff's on-coming car. The highway was suddenly obstructed and a sudden peril was created. Defendant's servant was beneath the wreckage. It was inconceivable that he was not seri-

ously injured. What more natural than that plaintiff should go to his assistance?

Defendant's wrecked truck, the pole and the wires were upon the public highway, partly upon the concrete and partly upon the gravel shoulder. Plaintiff walked upon the concrete of the public highway and was still upon that concrete when he was almost electrocuted. The obvious negligence of defendant's servant, in forcing a wild and uncontrolled skid of defendant's truck, was the initial act, setting up a chain of circumstances which ran unbroken to plaintiff's injury. That initial act of negligence caused the obstruction in the public highway; it brought down the electric wires and, with them, peril to the public. It placed defendant's servant in his position of apparent peril, urging and inviting plaintiff and other users of the highway to use that highway to aid the imperiled man. As elsewhere herein stated, the negligence of defendant's chauffeur set a trap upon the public highway and baited that trap with a person in peril, so that plaintiff was urged to a rescue and brought to the point of danger.

Defendant attempts to make a point of the circumstance that the skid began and the wreck occurred in front of plaintiff's automobile, rather than beside it. Obviously, a link in the chain of circumstances may not be considered disassociated from the primary happening and its following consequential occurrences.

Defendant also attempts to disassociate the elements of speed, lack of warning, dangerous condition of the roadway, the sharp turn, the skid, the crash, the wreck of the machine, pole and wires, and ignores the fact that the entire happening took

place on a public highway which, by reason of negligence, chargeable to the defendant, was rendered dangerous to lawful use. The circumstance that such negligence also created an unusual happening, an emergency calling for rescue, where calm and deliberate observations, judgment and action might not be expected, is also ignored by the defendant.

Defendant also attempts to make the point that there was no negligence for which the plaintiff may recover unless defendant's chauffeur should have foreseen that this individual, the plaintiff, was likely to be injured in the exact way and manner in which he was injured. Obviously, this is not sound in law or logic. The authorities cited by the defendant, and from which quotations are given, unquestionably state the true reason and rule. But the facts and circumstances considered by these authorities materially and essentially differ from the instant case.

Defendant and defendant's chauffeur did owe a duty of care to the plaintiff, and to Mr. Miller, his passenger. They were lawful users of a public highway. They might presume that highway and every part of the right of way to be safe for their reasonable use. In overtaking and attempting to pass their automobile, defendant's chauffeur owed them the obligation, not only to avoid an actual collision with their machine, but to avoid conduct which it might be reasonably apprehended would place danger in their path or create a trap and a menace on the public highway.

The plaintiff and Mr. Miller were in grave danger, the circumstances considered, as defendant's machine approached, without warning and at terrific speed, on the icy roadway. They were in even

greater danger as defendant's chauffeur determined to attempt a turn about their machine at that speed and over that perilous surface. They were in grave danger as defendant's machine was passing their car and as it swung in front of their car and slipped and skidded about the highway, in their path. The danger was increased as the crash came, and the electric pole, with its highly charged wires, came tumbling down to obstruct the highway. Plaintiff did succeed in stopping his car; it was almost a miracle that he had not jammed on his brakes and thrown his car into a skid and a wreck, where he and his passenger might have been seriously injured or killed. Plaintiff certainly did not act recklessly when he hurried over the concrete of this public highway to the point where defendant's servant was beneath defendant's wrecked truck. He certainly acted as might have been expected, suddenly faced by this tragedy, in leaning over to rescue an apparently imperiled man without taking time to calmly observe that there were electric wires low over the wreckage, and that those wires were uncovered. *Defendant sidesteps the outstanding fact that everything that occurred from the moment defendant's chauffeur decided on his course of conduct, until plaintiff tumbled to the gravel, horribly shocked and burned, occurred on a public highway.*

There is a regulation in the Traffic Act, 1928, P. L. Ch. 281, Article VIII, 11 (a), which restates the legal duty one driver owes another when following him on the highway:

“The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent having due regard to the speed of

the preceding vehicle and the traffic upon, and condition of, the highway.”

That the defendant owed the plaintiff a duty of reasonable care, in approaching and passing, there can be no doubt in view of the authorities. In *Pool v. Brown*, 89 N. J. L. 314; 98 Atl. 262 (1916), Kalisch, J., speaking for the Court, said:

“Under the traffic law of this State, the driver of a vehicle is required to pass the vehicle ahead of him to the left. That requirement, however, is subject to the conditions existing in the highway and does not relieve the driver of the passing vehicle from the duty of exercising reasonable care to ascertain whether he can pass the vehicle ahead with safety to other vehicles or pedestrians which or who may happen to be on the left side of the street. *Smith v. Barnard*, 82 N. J. L. 468; 81 Atl. 734; 41 L. R. A. (N. S.) 322.”

In Vartarian's Law of Automobiles in New Jersey (1929), the author says at paragraph 61:

“A driver attempting to pass in car in front of him is bound to exercise a high decree of care and see that the situation is such that he can pass in safety.”

In *Ezzo v. Geremiah*, 107 Conn. 670; 142 Atl. 461 (1928), Wheeler, C. J., speaking for the Court, said:

“Assuming a roadway of reasonable width, such as this, for a car to pass, the giving of reasonable notice by the driver of the car desirous of passing to the car ahead, and no other

unusual conditions of traffic or roadway, the driver attempting to pass is not required to use more than ordinary care in the driving of such an instrumentality.”

In *Rose v. Cartier*, 45 R. I. 150; 120 Atl. 581 (1923), Vincent, J., speaking for the Court, said:

“An examination of the transcript discloses that there is testimony from which the jury might find that there was negligence on the part of the defendant. He was attempting to pass the truck, which, according to the statement of its driver, was maintaining a straight course. If that were so, the defendant would be guilty of negligence if he so carelessly directed or managed his automobile that a collision resulted, or if he made the attempt to pass at a time or under conditions which would not be reasonably safe and prudent.”

In *Radford Grocery Company v. Andrews*, 5 S. W. (2d) 1010 (Texas) (1928), Randolph, J., speaking for the Court, said:

“The charge quoted is an exemplification of the Court’s definition of negligence, in that the Court instructs the jury that a failure to use ordinary care in approaching or passing other vehicles is, *per se*, negligence. In that respect, the charge attacked is sustained by the following authorities:” (Citing Texas cases.)

Defendant was obligated to exercise reasonable care in executing the entire maneuver of passing the plaintiff; bound to contemplate the probable con-

sequences of his recklessness to the ultimate end. Passing the plaintiff recklessly and at a very high rate of speed, on an icy road, is a breach of the duty to exercise reasonable care. The defendant should have foreseen that such a breach would place the plaintiff in danger of fatal injury or serious bodily harm, should have foreseen that a skid was inevitable, and should have anticipated that the skid would end in a crash. He could reasonably have anticipated a wrecking of his truck and the electric light pole and line; he could and should have anticipated the creation of an obstruction to traffic on the public highway, with consequent danger to the travelling public; he could and should have anticipated injury to the plaintiff through the dangerous trap his negligent act was creating on the highway.

Under the statement that "defendant's duty to exercise care does not protect the plaintiff against the hazard of the injury he received," defendant cites and quotes from several cases. In submitting this argument defendant admits, in effect, that the conduct of its chauffeur was negligent as defendant's car was driven to and past that of the plaintiff. Defendant then attempts to cut the chain of circumstances and to argue that the uncontrolled force set in motion by this admitted reckless attempt of defendant's chauffeur to cut around plaintiff became, at some undefined point, so disassociated with the plaintiff that, although plaintiff was injured upon a public highway while doing a lawful act, and one demanded by law and the urge of humanity, plaintiff is left without remedy.

In the case of *Corris v. Scott*, cited by defendant, the plaintiff had no right unless under a statute;

the statute was held by the Court not to contemplate such a remedy as that sought by the plaintiff. In the instant case there are statutes and decisions defining the obligation of defendant's chauffeur in approaching and passing plaintiff's car, but the rule of conduct to be observed is also defined by the common law and decisions thereunder; there are the rules and decisions declaring that a public highway shall be safe for lawful use and that obstructions and dangers shall not be created therein; there are rules and authorities measuring conduct in emergencies; and there are the authorities defining rules affecting rescues.

The case of *New York, etc., Railroad Company, v. Ball*, from which several quotations are presented by the defendant, is equally inapplicable to the present case. There, there was a collision of trains. Plaintiff had a judgment against the carrier operating the train which collided with the train on which he was riding. The verdict was challenged on an argument of contributory negligence. The Court held that the plaintiff could not be guilty of contributory negligence as to dangers which he could not anticipate, and which he might not avoid. In the instant case defendant's chauffeur carelessly entered upon a maneuver, starting a series of happenings which resulted in the injuries to the plaintiff. Could the defendant argue that plaintiff could not recover if, in skidding, defendant's machine had whirled about in front of plaintiff's car so that plaintiff could not avoid striking it, and, in the collision, he was injured? Could the defendant argue that if plaintiff, faced with this sudden emergency, had jammed on his brakes and skidded to his injury,

that he could not recover? Could the defendant argue that plaintiff could not recover if there had been an explosion in the wreck of defendant's truck as plaintiff was lawfully upon the highway, and he was injured? Suppose that electricity from the cables, brought down by the crash, was the demonstrable cause of such an explosion; could that conceivably relieve defendant of responsibility? The fallacy of defendant's argument is demonstrated by consideration of these questions.

Defendant's conclusion, in submitting argument on this proposition, limits the point involved. It is the hazard of electric burns that, defendant argues, was *ab extra*. Suppose that the pole itself, in falling, had struck and damaged plaintiff's automobile or injured the plaintiff; could it be properly argued that the fact that it was the pole which struck plaintiff's machine, rather than some part of defendant's truck, left the plaintiff without remedy? And above and beyond all this, defendant still ignores the inescapable fact that everything that occurred happened on the public highway, while plaintiff was performing a lawful act.

## 2.

DEFENDANT'S CLAIM THAT PLAINTIFF  
VOLUNTARILY ASSUMED THE RISK OF  
INJURY.

(Points 4 and 5.)

The argument of defendant-appellant, under this sub-title and points 4 and 5, is based upon an unwarranted assumption of fact. When plaintiff hurried to the rescue of defendant's servant beneath the wreckage and apparently in imminent peril, defendant states as a fact that "the wires were in plain view of the plaintiff." Defendant also states that "where the plaintiff perceives the danger and comprehends the risk, \* \* \* *volenti non fit injuria.*"

The wires might have been seen, conceivably, by the plaintiff. His eyes and mind were, however, upon defendant's servant in a position of obvious peril. Plaintiff was acting in a sudden emergency and upon an impulse to save a fellow human being. He moved to the rescue upon a public highway, which assumably was a safe place.

Defendant refers to two cases, *Thomas v. Quartermaine* and *Goetz v. Hydraulic Pressed Brick Co.* These cases do not apply. In the Thomas case the plaintiff fell into a large open vat containing scalding liquids. He had been employed about that vat over a period of time and knew of its existence and the scalding liquids it contained. He was not acting in any emergency, his attention was not distracted

by any sudden happening or the necessity of a rescue.

Plaintiff testified that following the crash he stopped as quickly as possible.

“I got off on the side of the road, like, to get out of the way of the traffic. He has got the right-hand side of the road blocked” (p. 43, l. 20).

“I saw the accident happen, but, man, when everything is done as quick as that to you, what are you going to? Are you going to tell all about it?” (p. 43, l. 31).

“I didn’t realize, your Honor, the pole was broke” (p. 44, l. 1).

“I didn’t, because I don’t stop to look to see what is the matter when I get up there” (p. 44, l. 18).

“When you came up there you saw the truck there in front of you?

A. Yes, but would you if I was jammed under there take time to investigate all about that? I don’t know no more about that than you do, really” (p. 44, l. 33).

“I tried to help him out.

Q. Where were you standing when you tried to help him out?

A. Well, my feet was on the cement road. His car had pulled across the cement road after it hit the pole and turned out” (p. 45, l. 21).

“As you came down the road you didn’t see any wires sagging down along the side of the road?

A. I did not.

Q. You didn’t see any wires at all? How do

you explain the fact that you didn't see a heavy electric wire sagging right down by this truck?

A. I don't know as anybody else can explain it. I didn't see them, and I don't think Mr. Miller did" (p. 46, l. 1).

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3.

DEFENDANT'S CLAIM THAT ITS "INITIAL NEGLIGENCE" WAS NOT THE LEGAL CAUSE OF PLAINTIFF'S INJURY.

(Points 6 and 7.)

What does defendant mean by its "initial negligence?" Which link in the chain of happenings is admitted; where does defendant arbitrarily call a halt?

It admits that its chauffeur acted recklessly in throwing its car into an uncontrollable skid. It admits that the skid caused the crash. It admits the wreck of its truck and of the electric pole as part of that crash. It admits that its servant was underneath that wreckage and that the electric cables were hanging on or just above it, dropped there in the crash. It admits that the wreckage, including the cables, was upon the public highway.

From squib to explosion, or skid to burn, it was a fast-moving, continuous, one-act happening.

Isolate the negligence of its chauffeur "*at the moment*" he "drove past the plaintiff's automobile." That, says the defendant in its brief (p. 18,

l. 12), was his "initial negligence." *That moment, and that moment alone, it argues in its brief, is to be legally charged to it.* The squib has been thrown, its admits; that initial heave, it argues, did no damage; it washes its hands of the matter.

Defendant imagines a skid through a bridge and the chauffeur caught under water in the creek. The would-be rescuer jumps overboard and drowns. Defendant might have added that its supposed plaintiff jumped overboard knowing he could not swim a stroke.

Knowing he couldn't swim, plaintiff did not jump overboard. *He remained on the public highway; he went to the wreck of defendant's car on that highway.* He leaned over to help defendant's servant from a position of apparent serious peril—*on part of that same public highway.* He acted upon a natural impulse; *in the sudden emergency defendant had created, plaintiff did not chance to see the low-hanging cable defendant's negligence had brought down.*

Or, suppose the skid didn't commence beside or at plaintiff's car, but a mile down the road and dissociated entirely from plaintiff's automobile, suggests the defendant. But such is not the case or the fact. It *was* in the passing of plaintiff's car that the "initial negligence" was committed. Then and there the skid began; consequences followed without break until plaintiff lay unconscious and burned.

But, further argues the defendant, "the plaintiff's voluntary intervening act is a *novus actus interveniens*" and he is left without remedy. Its truck, it argues, "had come to rest," the "active force of

the skidding" had "spent itself harmlessly" before plaintiff acted to get hurt. Its servant, however, was apparently still in extreme peril. Plaintiff but hurried a few feet on the public highway to lean down to help him. Its truck had, possibly, come entirely to rest, it may be that the wrecked pole and attached cables had fallen "dead" and were not still swinging to catch the unsuspecting. It may be, but it was not proven. Whether the wreckage had come to rest or not, there was still action and peril at the wreck, peril that called for help.

True, defendant's driver tried to say he escaped by himself. But other testimony and the circumstances brought a different jury finding.

What plaintiff did, defendant argues, he did as a "voluntary, conscious action of a reasoning human being." Not so as stated. Voluntary, true, in the sense that he needed no prompting to help his apparently imperiled fellow-being, but not voluntarily certainly in the sense that he volunteered to bump his head into an electric cable. "Conscious action?" Plaintiff testified, Miller corroborated, that in the emergency the wires were not observed. "Reasoning?" There was no time for plaintiff to reason; he testified he did not stop to inspect, judge and reason.

Defendant argues also that it "cannot be held liable for *the mere condition which it created, and which was not dangerous,*" it says, to the plaintiff or any other traveller upon the highway. But plaintiff was a traveller on that highway, and there, in the performance of a lawful and laudable act, he was almost electrocuted by that "mere condition which it created."

The question of proximate cause is so closely linked with the question of negligence, that consideration of one involves a consideration of the other. The defendant owed the duty of reasonable care to plaintiff while passing and until he had safely set the wheels of his automobile in a straight course and in firm contact with the road. The slipping and skidding happened before defendant righted his truck on the road ahead of the plaintiff, and at no time, from the beginning of the act of passing the plaintiff until the defendant crashed into the electric pole, did the latter have his car under control.

This brings us to a consideration of several pertinent hypothetical situations:

(1) If the defendant skidded into the plaintiff while passing the plaintiff, he would have been clearly liable.

(2) If the defendant skidded into the middle of the highway just after the rear of his machine cleared the front of plaintiff's, blocking the road, and the plaintiff crashed into him, he would be liable. He would not have completed the maneuver of passing the plaintiff and placing his truck safely on the road ahead. The defendant could and should foresee, if he contemplated passing the plaintiff, that the maneuver would require a sequence of acts by any one of which the plaintiff might be put in danger.

(3) If the defendant's skid and wreck obstructed the public highway and created a trap and a peril, he was liable to plaintiff or any other lawful user

of the highway who might be injured thereby without fault on his part.

Further, the plaintiff would be legally bound to go to the aid of the imperiled defendant by reason of the provision in the Motor Vehicle Act, 1921, P. L. Ch. 208, Section 14 (4), which provides as follows:

“Every person operating a motor vehicle who shall knowingly be involved in an accident shall at once stop and ascertain the extent of the injury and render such assistance as may be needed \* \* \* .”

The duty to stop and give assistance is made mandatory by the Traffic Act, 1928 P. L., Ch. 281, Article 11:

“1. The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident.

3. The driver of any vehicle involved in an accident resulting in injury or death to any person \* \* \* shall render to any person injured in such accident reasonable assistance \* \* \* .”

It seems reasonable, in view of the foregoing considerations, that the defendant should have foreseen that to attempt to pass the plaintiff at a recklessly high rate of speed might start his truck skidding, and the plaintiff or some user of the highway might be injured. The defendant need not be a prophet who can foresee every detail of which is going to happen. He need not foretell the exact

manner of the happening. All any man can foresee as a result of his careless acts is that injury may result to someone of a class of persons of whom he should be aware. We contend that a prudent man in the position of the defendant should have foreseen that such reckless driving at a high rate of speed, on an icy highway, might result in injury to the plaintiff, his passenger, or other lawful users of the highway coming without fault into the peril defendant would create. It is submitted that the main events which did happen are within the realm of foreseeability.

The defendant makes much of the fact that the crash into the electric pole happened too far from the road from the place where the defendant's carelessness began for any liability to attach. To argue thus is to say that distance is magic. That view overlooks the very foundation of liability in negligence cases. That the wrecking of defendant's car was one of a series of events which happened as a matter of course and in an unbroken line because of the defendant's disregard for the safety of the plaintiff, is almost too clear for argument. The plaintiff stopped his car immediately upon arriving at the scene of the accident, jumped out, and ran to the aid of the imperiled man. The action of the plaintiff was instinctive; it was *quasi* involuntary, in that he acted upon a humanitarian impulse. Further, by reason of the provision of the Motor Vehicle Act and the Traffic Act quoted above, the plaintiff was under a legal duty to go to the aid of the defendant's servant.

There are many cases which hold that one who is injured while going to the aid of another who is

imperiled or in danger of serious bodily harm, can recover damages from the one whose negligence created the situation which invited rescue. We have selected perhaps the most authoritative case, noted for the lucid opinion of Justice Cardozo: *Wagner v. International R. Co.*, 232 N. Y. 176; 133 N. E. 437; 19 A. L. R. 1 (1921). The facts were that Wagner fell through a trestle while going to rescue one who had been thrown from a crowded car due to the railroad's negligence. Cardozo, J., speaking for the Court, said:

"Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable."

\* \* \* \* \*

"The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."

It is said in *Norris v. Atlantic Coast Line R. R. Co.*, 152 N. C. 505; 67 S. E. 1017; 27 R. A. (N. S.) 1069 (1910), by Hoke, J.:

"\* \* \* when one sees his fellow man in peril, he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptness of a generous nature and ex-

tend the help which the occasion requires and his efforts will not be imputed to him for wrong, according to some decisions, unless his conduct is rash to the degree of recklessness; and all of them hold that full allowance must be made for the emergency presented. This principle \* \* \* prevails without exception so far as we have examined."

Further, the antecedent negligence of person to whose aid the plaintiff went, is not imputable to the plaintiff. For example see *Bond v. B. & O. R. R.* (*supra*), 82 W. Va. 558; 96 S. E. 932; 5 A. L. R. 201 (1918). It is said in the Court's opinion:

"These authorities" (those mentioned in the opinion), "further hold that contributory negligence on the part of the person rescued does not preclude right of recovery on the part of the rescuer."

See annotation 5 A. L. R. 206:

"By the weight of authority, in case of an injury in attempting to rescue another, the antecedent negligence of the person rescued is not imputable to the rescuer."

In *Pittsburg, C. C. St. L. R. Co. v. Lynch* (1903), 69 Ohio St. 123; 63 L. R. A. 504; 68 N. E. 703, it was said in the course of the opinion:

"But regarding the peculiar circumstances of the case, counsel for the company insist that the rescuer could not recover for the injury to him if the person rescued was in peril because of such contributory negligence on her part as

would have prevented a recovery by her if she had been injured. \* \* \* If the view now urged by counsel is considered unaffected by the decided cases, it must be rejected because of impracticability of applying it. It wishes the principle of subrogation as the test of the plaintiff's right to recover. \* \* \* It seems clear that the law will not admit of the suggested refinement."

From this it appears that recovery in the rescue cases is on a distinct ground, that is, there is a duty running to a class of which a rescuer may be one. A breach of that duty by the defendant, namely the careless use of the highway, created a situation which invited rescue. He placed live wires in a perilous position in the road to confront a rescuer. All this happened because the defendant was imprudent in the use of the road. He should have foreseen that his careless acts might place him in such a position as to invite rescue.

It is not denied that defendant's chauffeur was negligent in passing the plaintiff, and that that negligence caused defendant's chauffeur to skid into the electric light pole. Thus he was placed in a perilous position. *The plaintiff then became the victim of circumstances—the creature of a generous involuntary impulse. The chain of close events lead straight from the culpable conduct of defendant's chauffeur, to the injury to the plaintiff.* The fact that the chain of connected events is long is no reason for saying that the negligence of defendant's servant was not the proximate cause of the plaintiff's injuries. It is well to review the fundamental concept of proximate cause. A very learned com-

ment is contained in *Powers v. Standard Oil Co.*, 98 N. J. L. 730; 119 Atl. 273 (1923). Speaking for the Court, Minturn, J., said:

“The efficient proximate or intervening cause in such a situation is tantamount in law to the force or operating factor, without which the accident could not have happened. Such a power must have been active, operative, and carrying and containing within itself the possibility and potentiality for harm; as in the famous Squib Case, 2 Wm. Blackstone, 892; or in the fire cases emanating from the sparks of a locomotive through the mediation of intervening combustible property, *D. L. & W. R. R. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214; or the case of a runaway horse which was allowed to remain untied upon the highway and which was engaged in an earnest effort to avoid the runaway, in which this Court held the efficient and probable cause of the damage to be, the actual operating illegal force in the first instance of the untied horse, without which the accident would not have occurred, even conceding the ill-advised effort of the colliding truck in its attempt to evade the danger, *Marshall v. Suburban Dairy Co.* (N. J. Sup.), 114 Atl. 750.”

This comment would seem to answer the argument that the intervening act of the plaintiff in going to the rescue destroyed the causal chain. The *causa sine qua non* was the recklessness of defendant's chauffeur which set off a series of events each following in an uninterrupted sequence. The question of proximate cause has been considered in

the rescue cases. The note in 19 A. L. R. 4, backs our conclusion; it is said at page 13:

*"The proximate cause of injury to one who voluntarily interposes to save the lives of persons imperiled by the negligence of another is the negligence which caused the peril. Maryland Steel Co. v. Marney, (1898) 88 Md. 482; 42 L. R. A. 842; 71 Am. St. Rep. 441; 52 Atl. 60; 5 Am. Neg. Dig. 159; Perpich v. Leetonia Min. Co., (1912) 18 Minn. 508; 137 N. W. 12; Bord v. Baltimore & O. R. Co., (1918) 82 W. Va. 557; 5 A. L. R. 201; 96 S. E. 932; 19 N. C. C. A. 674."*

Because some features of this case are new in New Jersey we submit for consideration another excerpt from the great opinion of Cordozo, J., in *Wagner v. International Ry. Co. (supra)*:

*"In this case the plaintiff walked more than 400 feet in going to Herbert's aid. He had time to reflect and weigh; impulse had been followed by choice; and choice, in the defendant's view, intercepts and breaks the sequence. We find no warrant for thus shortening the chain of jural causes. We may assume, though we are not required to decide, that peril and rescue must be in substance one transaction; that the sight of the one must have aroused the impulse to the other; in short, that there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences. If all this be assumed, the defendant is not aided. Continuity in such circumstances is not broken by the exercise of volition. Twom-*

ley v. Central Park, N. & E. River R. Co., 69 N. Y. 158; 25 Am. Rep. 162; 5 Am. Neg. Cas. 217; Donnelly v. H. C. & A. I. Piercy Contracting Co., 222 N. Y. 210; 118 N. E. 605; 18 N. C. C. A. 434; Bird v. St. Paul F. & M. Ins. Co., 224 N. Y. 47, 54; 120 N. E. 86; 13 A. L. R. 875. So sweeping an exception, if recognized, would leave little of the rule. 'The human mind,' as we have said (People v. Majone, 91 N. Y. 211, 212), 'act with celerity which it is sometimes impossible to measure.' The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. *It is enough that the act, whether impulsive or deliberate, is the child of the occasion.*"

An abundance of cases hold that incurring danger to aid another is not contributory negligence. For example see 45 C. J. 966, par. 520:

"One is not guilty of contributory negligence in exposing himself to danger of injury in order to rescue another from imminent danger of personal injury or death, if, under the circumstances, an ordinary prudent person might have so exposed himself. \* \* \* This is true even though the person attempting the rescue knows that it involves great hazard to himself without certainty of accomplishing the attempted rescue." (Many cases cited in notes.)

See note in 19 A. L. R. 5:

"The rule is well settled that one who sees a person in imminent and serious peril through the negligence of another cannot be charged

with contributory negligence, \* \* \* that \* \* \* question is ordinarily for the jury, and not for the Court.”

Voluntary incurrence of risk to effect a rescue is not a bar to the plaintiff's right to recovery. There is little doubt but that the cases support this contention. For example see *Bond v. B. & O. R. R.*, 82 W. Va. 358; 96 S. E. 932; 5 A. L. R. 201 (1918), Poffenbarger, P., speaking for the Court said:

“An overwhelming weight of authority denies that voluntary incurrence of risk in effecting a rescue from danger occasioned by negligence amounts to contributory negligence, unless the act of intervention was performed under such circumstances as would make it rash or reckless in the estimation of the ordinary prudent person.”

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THE PLAINTIFF WAS EXERCISING DUE  
CARE WHEN INJURED.

It would seem that the sight of one in imminent danger is such a fact as to divert a prudent man's attention from the usual objects on a road. It has been held that one who has been put in danger and takes a risk to avoid injury, but is injured nevertheless, is not contributorily negligent and may recover from the one whose carelessness created the emergency. For example see *Tuttle v. Atlantic City R. R. Co.*, 66 N. J. L. 327 (1901), Vroom, J., speaking for the Court of Errors and Appeals said:

“The doctrine is concisely stated in 1 Shearm & R. Negl. \*89: ‘If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that if he had chosen the other hazard he would have escaped injury, is of no importance.’ ”

The cases on acts in emergency are applicable to the instant case, for the reason that both types of cases require instant action by the one who tries to save life or prevent injury. In the emergency cases the actor tries to prevent injury to himself; in the rescue cases the actor tries to prevent injury to another. In each type of case the actor has no time to weigh the probabilities of success. His act is the “child of the occasion.”

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THE DEFENDANT CREATED AN UNAUTHORIZED AND DANGEROUS OBSTRUCTION AND A TRAP IN THE PUBLIC HIGHWAY AND IS LIABLE IN DAMAGES TO THE PLAINTIFF, WHO WAS INJURED THEREBY.

If one without authority or through negligence causes the highway to be obstructed, he creates a nuisance and should be responsible for the injuries caused by the obstruction, providing the user of the

highway used ordinary care. This proposition is backed by a great weight of authority:

In *Brady v. Public Service Ry. Co.*, 80 N. J. L. 471; 79 Atl. 287 (1911), the plaintiff was driving along a highway at night when he collided with a wagon which had been left on the road. He was thrown from his own vehicle and hurt. The evening before, the defendant's trolley ran into the wagon, and one of the employees pulled it off to one side and left it on the road, with a red light as a warning. Gummere, C. J., speaking for the Supreme Court said:

“Every person having occasion to use the public highways of the State is entitled to feel that he is absolutely safe, while using ordinary care, and no one has a right, without special authority, to obstruct a public highway or render its ordinary use dangerous. If he does so, he thereby creates a public nuisance, and for injuries directly resulting therefrom to travelers upon the highway he is legally answerable. *Bowen v. Detroit City R. Co.*, 54 Mich. 496; 20 N. W. 599; 52 Am. Rep. 822; *Harlow v. Humiston*, 6 Cow (N. Y.) 189; *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260; *Driscoll v. Carlin*, 50 N. J. L. 28; 11 Atl. 482.”

In *Driscoll v. Carlin*, 50 N. J. L. 28 (1887), defendant's employee had, in the scope of his employment, placed timbers upon the sidewalk of a street. The plaintiff while passing along the street fell over them and was injured. Dixon, J., said:

“Indeed, the case comes within the familiar rule that if one does or authorizes the doing of

an act which creates a public nuisance by unlawfully obstructing or interfering with the free use of a highway or otherwise, he becomes answerable in damages to those who suffer special injury thereby. 1 Add. on Torts, par. 234; Harlow v. Humiston, 6 Cow. 189; Runyan v. Bordine, 2 Green 472; Temperance Hall Assn. v. Giles, 4 Vroom 260; McAndrews v. Collerd, 13 Vroom 189."

In *Durant v. Palmer*, 29 N. J. L. 544, 547 (1862), Haines, J., speaking for the Court said:

"The street, and every part of it, by force of common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance."

In *Opdycke v. Public Service Ry. Co.*, 78 N. J. L. 576; 76 Atl. 1032; 29 L. R. A. (N. S.) 71, (1910), Pitney, Ch., speaking for the Court of Errors and Appeals said:

"It is well settled that one who places an unauthorized obstruction within the limits of a highway as laid out is liable to an action at the suit of any person who is thereby specially damaged, *and this although the obstruction or other nuisance may be without the limits of the traveled way.*"

The nuisance theory for liability has been upheld irrespective of whether or not the defendant was negligent.

See 29 C. J. 678, par. 442.

“The liability of an individual who without authority of law creates a dangerous condition in the highway, to a person injured thereby, is generally based on the theory that the defect or obstruction constitutes a nuisance, and accordingly it has been decided that the liability of such person is not affected by the question whether he was actually negligent.”

A strong statement as to the liability in such cases is made by a New York Court in *Congreve v. Smith*, 18 N. Y. 79, at 82:

“The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it \* \* \* and as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. *No question of negligence can arise, the act being wrongful.*”

One who knowingly or unknowingly encounters a dangerous obstruction when going to save the life of or prevent serious injury to one who has been in an accident cannot be said to be contributorily negligent or to assume the risk of a danger he has not time to gauge. The circumstances always control and they are for the jury: In *Durant v. Palmer* (*supra*), at page 546, Haines, J., speaking for the Court of Errors and Appeals said:

“Ordinary care was held to be that degree of care which may reasonably be expected from a

person in the plaintiff's situation and which is synonymous with reasonable care."

In *Morhart v. North Jersey Street Ry. Co.*, 64 N. J. L. 236 (1899), a bicyclist was riding on the highway when he encountered a hose stretched across the street and was thrown to the road. Magie, C. J., speaking for the Court of Errors and Appeals said:

"A passenger along a public highway may expect to meet other passengers on foot or in vehicles. The observation which due care would require him to make as to such obstacles to his safe passage would be of one character. But as to obstructions placed therein not in connection with the ordinary public use of the road and of which no sufficient warning was given, the required observation may be different.

He may to some extent rely on the public way being preserved safe for passage. *Durrant v. Palmer*, 5 Dutcher 544; *Houston v. Traphagen*, 18 Vroom 23. *Whether, in respect to such occasional and unusual obstructions, the passenger has exercised due care in observing and avoiding them must generally be a question for the jury. It was clearly so in this case where the injurious obstruction was of a kind likely to escape observation.*"

It is said in *Symes v. Morris County Construction Co.*, 1 M. 525 (1923), by the Court:

"The travelling public have a right to suppose that there is no dangerous impediment or pitfall in any part of the street. *Durant v.*

Palmer, 29 N. J. L. 547; *Quimby v. Fidler*, 62 N. J. L. 769.”

In *Houston v. Traphagen*, 47 N. J. L. 23 (1885), the question arose whether the injured plaintiff contributed to the injury where it appeared that he stepped into an unguarded opening while his attention was attracted to objects in a shop window above the opening. In holding that a motion of non-suit was properly denied, Magie, J., speaking for the Court, said:

“\* \* \* it was correct to permit the jury to say whether plaintiff was negligent in walking upon a public sidewalk, and, in the absence of any notice of danger, in reliance on the public way being preserved safe for passengers, permitting his attention to be drawn from the spot on which he was about to step, to surrounding objects. A verdict finding no negligence in such conduct ought not to be disturbed.”

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No. 4.

Point 8. Defendant alleges that the trial Court erred in charging the jury as follows:

“Every person operating a motor vehicle who shall knowingly be involved in an accident shall at once stop and ascertain the extent of the injury and render such assistance as may be needed” (S. C. 166, l. 8; S. C. 157, l. 27).

The whole charge must be considered and read with and applied to the undisputed testimony in the record. *Kneip v. N. Y. and L. B. R. Co., et al.* (Errors and Appeals, 1926), 102 N. J. L. 374; 131 Atl. 886.

Defendant's exceptions (p. 161, l. 1), challenged only the quoted portion of the Court's charge. In this respect the exception was insufficient. *Giardelli v. Public Service Ry. Co.*, 8 Misc. 104; 149 Atl. 39; *Thibodeau v. Hamley*, 95 N. J. L. 180; 112 Atl. 320. *Stathos v. Bunevich*, 9 A. R. 97; 153 Atl. 572.

It was proper for the trial Judge, as he did, to call attention to a section of the Motor Vehicle or Traffic Act.

*Kastner v. Weinstein*, 9 A. R. 79; 153 Atl. 538.

What the Court actually said was:

"I am requested to charge several requests. I will take the plaintiff's up first. \* \* \*"

"Number Three: 'Every person operating a motor vehicle who shall knowingly be involved in an accident shall at once stop and ascertain the extent of the injury and render such assistance as shall be needed.' I so charge you that that is what the statute says, but that statute would not excuse the lack of ordinary care as I have defined ordinary care to you in the charge. In other words, the statute does not fix the liability in this case. The question of the reasonable degree of care exercised by the plaintiff and by the defendant, as I have charged, is that from which you may fix the liability."

But the Court had made particularly clear the propositions of law applicable to the parties, both plaintiff and defendant. Touching the point concerned in the portion of the charge challenged, the Court, in addition, said:

“The defendant says the plaintiff was guilty of negligence himself in such a manner that had he not been negligent he would have received no injury by reason of the negligence of the defendant. That, again, is not such a hard proposition to deal with, because the question you have to answer in determining it is a simple one, and practically the same question you have asked on the plaintiff’s case. Scrutinizing the plaintiff’s actions at and about the time of this accident, did he conduct himself as a reasonably prudent person would and should have done under the circumstances with which he was confronted at and about the time he received these burns? If he failed to exercise that reasonable degree of care with which the ordinary person is charged under like circumstances and conditions, and his failure so to do contributed to the accident and the subsequent injuries that he sustained, then he cannot recover” (l. 13, p. 154).

“In order to determine whether or not the plaintiff himself was guilty of contributory negligence, you have an allegation in the complaint that as the plaintiff drove along the road, suddenly and without warning—and it would seem to me the question of warning is of very little moment—an automobile passed him on his left, and the plaintiff says that automobile was going

at a high rate of speed, and at some point in the progress of defendant's automobile it skidded, that it went into a light pole, knocked it down, and that the driver of that truck was entangled or enmeshed or in some way pinned under that automobile, and that the plaintiff, seeing the predicament of the driver of that truck, and moved by a desire to render his fellow man a service, by a desire to rescue him, hastened to the scene, and while in an attempt to rescue, was burned" (l. 13, p. 155).

"In the first place, was there an attempt at rescue on the part of the plaintiff, or was the driver of that truck in position so that he did not need to be rescued and so that it was obvious he did not need to be rescued? I think it is important that you should decide that point at the outset of your inquiry as to the contributory negligence of the plaintiff, because what a reasonable person, an ordinarily prudent person should do is circumscribed to a large extent by the conditions with which he is confronted. If the plaintiff as he approached the scene of this overturned automobile saw under it a man in imminent peril, and through humane motives he rushed to his assistance, he would only be chargeable with that degree of care which the ordinarily prudent person would exercise on a like mission and under like circumstances and under like conditions; but if, instead of doing whatever he did do, with the laudable intention of a rescue, he saw this driver standing on the road, without need of rescue, then his conduct must be tested by the circum-

stances and conditions with which he was surrounded under those circumstances and not under the rescue circumstances'' (l. 4, page 156).

Therefore, respectfully submitted that there was no error in the charge taken as a whole and in the reference to this statute as guardedly made by the trial Court.

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5.

DEFENDANT'S CLAIM THAT THE COURT  
ERRED IN CHARGING PLAINTIFF'S RE-  
QUEST NUMBER SIX.

(Point 9.)

Defendant's exception to that portion of the charge objected to appears at line 15, page 161, of the State of the Case. It does not attempt to point out with particularity to the trial Court the error complained of; in this respect, it is too broad. *Thibodau v. Hamley*, 95 Law 180, 112 Atl. 320; *Giardillo v. P. S. Rwy. Co.*, 8 Misc. 104; 149 Atl. 39; *Stathos v. Bunevich*, 9 A. R. 97, 153 Atl. 572.

This is the record:

“The Court: Number 6.

‘Every person having occasion to use the public highways of the state is entitled to feel that he is absolutely safe, while using ordinary care, and if one renders its ordinary use dangerous, he is legally answerable for injuries di-

rectly resulting therefrom to a lawful user of said highway.' I so charge.'"

The language of this charge was, in effect, the language of Chief Justice Gummere and taken from the opinion of the Supreme Court in the case of *Brady v. P. S. Railway Co.*, 80 Law 471; 79 Atl. 287.

In the Brady case, the defendant railway company wrecked a swill wagon through negligence. The remains of the wagon were upon the highway, partly obstructing the defendant company's tracks. The company then shifted the debris further over on the highway and on the second night permitted it to be unlighted. In some respects the case is strikingly similar to the instant case. There, as here, negligence resulted in a crash which deposited debris upon a public highway. There, as here, a lawful user of the public highway was injured by coming in contact with the wreckage. Here the plaintiff was led to his injuries by the fact that his machine was a factor in the movement which, negligently performed, produced the crash. In this respect the present case is stronger than the Brady case. The Brady case is silent as to the particular piece of wreckage which caused the injuries—because, negligence having produced all the wreckage, that was there, as here, immaterial.

Chief Justice Gummere said:

"If the demolition of the wagon had been the act of someone other than the company, or one of its servants, \* \* \*. But the rule is otherwise with regard to the person who creates the obstruction. Every person having occasion to use the public highways of the State is entitled

to feel that he is absolutely safe, while using ordinary care, against all accidents arising from obstructions therein, and no one has a right, without special authority to obstruct a public highway or render its ordinary use dangerous. If he does so, he thereby creates a public nuisance, and for injuries directly resulting therefrom to travelers upon the highway he is legally answerable."

In the instant case the defendant attempts to deny plaintiff a remedy and to escape liability, although admitting negligence and admitting the obstruction on a public highway, by the contention that plaintiff's act in hurrying to an apparent necessary rescue was a "*novus actus interveniens*." Chief Justice Gummere, in the Brady case, quotes, with approval, from Joyce on Nuisances:

"One who creates a nuisance on the highway cannot shelter himself behind the claim that some one else is under a legal liability to remove it."

The defendant in the present case can no more argue that the act of the plaintiff in passing over the highway and bending down to a rescue thereon relieved defendant from liability than could the P. S. Railway Co. in the Brady case successfully contend that Brady's act in running into the obstruction while lawfully using the public highway was a new and intervening act sufficient to relieve it of liability.

Defendant, in effect, admits what it states in arguing this point, "elsewhere in the charge the

learned Judge properly charged the law of negligence.”

The whole charge must be considered and be read with and applied to the undisputed testimony in the record. *Kniep v. N. Y. L. B. R. R. Co.*, 102 Law 374; 131 Atl. 886.

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6.

This point of the defendant relates to its seventh ground of appeal and is covered by the argument under No. 1 (Points 1 to 3).

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7.

This relates to defendant's point 11. The matter concerned is also argued elsewhere under No. 2 (Point 6).

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CONCLUSION.

In conclusion, plaintiff respectfully submits that the judgment of the Court below should be affirmed.

Respectfully submitted,

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